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# Modern Business

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A SERIES OF TEXTS PREPARED AS  
PART OF THE MODERN BUSINESS  
COURSE AND SERVICE OF THE  
ALEXANDER HAMILTON  
INSTITUTE



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# Modern Business

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# COMMERCIAL LAW

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**MODERN BUSINESS**

VOLUME 24

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## PREFACE

This text on "Commercial Law" must not be deemed to contain the whole of the law of which it treats. A work more in the nature of a many volumed encyclopedia would be necessary for that purpose. It does contain, however, in simple form and with abundant illustration, the fundamental principles of the general law of contracts more frequently encountered in business. These comprise the contract of sale, contracts between principal and agent, master and servant, shipper and carrier, and the important contracts upon bills, notes and checks.

It is part of a modern business man's education that he should know something of law—the broad and universal principles—without being a lawyer. This is necessary quite as much as it is part of his education that he should know something of banking, insurance and transportation without necessarily being a banker, an insurance manager, or a railway superintendent. The more a man knows of the many phases and activities of modern business, the more readily—one might say the more accurately and instinctively—will he recognize and adopt the precautions and safeguards that keep his business affairs in a healthy and progressive condition.

“The Law,” said Burke, “is in my opinion, one of the first and noblest of human sciences—a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together.”

WALTER S. JOHNSON.

Montreal, Canada.

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# COMMERCIAL LAW

## CHAPTER I

### PRELIMINARY TOPICS

*1. Introduction.*—In recent years increasing attention has been given by business men, and by those preparing for commercial careers, to a study of mercantile law. Not only in commercial colleges, but in the extension courses of the larger universities, a serious effort is made to enable the business man to acquire some knowledge of the general legal principles applicable in his relations with his fellow men. Apart from the fact that the study of law affords an excellent training in accuracy of thought and expression, it is of the utmost practical value in the conduct of one's affairs.

An extension course of lectures in law or the study of a book like the present is not, of course, intended to make a man his own lawyer. Either should, however, if it has no other benefit, train a man to perceive or scent legal difficulties and suffice to warn him of the advisability of consulting a lawyer. The man of affairs who understands his position, his rights and liabilities, and the rights and liabilities of others, in matters relating, for instance, to contracts in general, to

negotiable instruments, to agency and partnership, to corporations, insurance, sales, bailments and carriers, is doubly armed for encounters in the arena of commercial life. Ignorance of the law, it has been said, is no excuse. The adage supplies its own commentary. Legal rules, it may here be said, are founded on common sense; they have been formulated out of the accumulated wisdom and experience of diverse peoples and countless generations; they represent the striving of men for just and wise guidance and restraints in human relationships.

Economic, social and political conditions throughout many centuries have molded the great body of general law. The process is going on even now. The student should approach the study with the desire to understand the rules of law; but he will understand these better if at the same time he seeks to appreciate their historical background, their wisdom, justice and harmony, and the point of view of the legislator.

2. *Definition of law.*—In its technical sense (for we are not here concerned with laws of nature, with divine or moral law) the term *law* means a general rule or a body of general rules of human conduct, enforceable by the public authority by which it is prescribed. In other words, a law is a general rule of external human action enforced by a sovereign political authority.

Technical law may be divided into two classes: (1) municipal law and (2) international law.

In another sense it may be divided into: (1) public law and (2) private law.

3. *Municipal law.*—By municipal law is meant the body of legal rules, or the system of social order, which is established and enforced by the state. It differs from public international law, which is not enforceable by any supreme authority. The state—the supreme authority—makes and enforces laws. It may delegate its authority in these respects: as, for example, where it grants authority to a province, a city or a territory, to make and enforce local laws. It must not be understood that the word “municipal” is used to designate only laws made by or relating to “municipalities.” The word is used in a technical sense, to include all laws enacted and enforced by a state or supreme authority, whether they relate to land, wills, partnerships, criminals or otherwise.

4. *International law.*—The affairs of nations among themselves require and, by consent or custom, are subject to certain rules and regulations. Public international law, then, is the body of rules which nations have by common consent recognized in the regulation of their affairs. We have pointed out that it differs from ordinary law in that it cannot be enforced. It is then, properly speaking, not law at all in the technical sense. Yet it forms part of the common law of England. The courts of England, Canada and the United States would recognize it under proper circumstances.

The field of international law is very broad. It

covers, for instance, rules for the treatment of contraband of war, prize-courts, the status of belligerents and neutrals, the laws of blockades, and so on. These and many similar subjects come within what is called public international law. In more peaceful matters, rules of international law may be applied to the interpretation of contracts, the validity of documents and agreements drawn in one country and enforceable in another, the determination of the status of individuals, and so on. These and many similar subjects are governed by rules of private international law, which will be enforced in the countries where they are to be applied.

Questions of international law may arise even as between persons domiciled in different provinces of Canada. One example will suffice. A person's capacity to contract is governed by the law of his domicile, i.e., of the country where he has his permanent home. A minor is domiciled in Ontario: his permanent home is there. By the law of Ontario, a minor cannot make a binding contract merely because he is a trader. In Quebec, a minor who is engaged in trade may make valid and binding contracts in connection with his trade. The Ontario minor goes to Montreal and starts in business. He gives promissory notes to his creditors, and the notes are not met at maturity. He is sued in Montreal, but pleads that his capacity is to be governed by the law of Ontario, where he is domiciled. His plea will be upheld and the action dismissed.

5. *Public law.*—By a “public person” is meant the state, or the sovereign part of it, or a body or individual holding delegated authority under it.<sup>1</sup> Public law, then, regulates rights where one of the persons concerned is “public.” Public law also includes constitutional and administrative law. The conquest of Canada, in 1763, had the effect of substituting the public law of England for that of France.

6. *Private law.*—Where the parties interested or affected by a right are private persons, they are governed by private law, which they may invoke the aid of the state to regulate and enforce. A given act, it must be said, may violate both a public and a private right. If one man assaults another, the private right of the person injured to be unmolested is violated, as is also the public right of the state that the public peace shall not be disturbed. Generally speaking, private law includes the law relating to contracts, torts or damages, pleadings, evidence—in a word, all the subjects that we shall treat of in this book, as well as many others.

7. *Sources of law.*—The sources of our law may be briefly mentioned. They are:

(a) THE CONFEDERATION ACT, AND SUPPLEMENTARY ACTS—THE CONSTITUTION OF CANADA. The Confederation Act was passed by the British Parliament March 29, 1867. On the first day of July, 1867, it came into force. It is the foundation and authority for our Federal system of government. From

<sup>1</sup> Holland, “Jurisprudence,” p. 124.

it flows the authority of the Dominion government and of the legislative bodies of the various provinces to make laws and to govern within their various jurisdictions.

(b) **DOMINION STATUTES.** The Dominion Parliament may make laws relating to the classes of subjects assigned to it by the constitution. In these matters it is supreme. It must not legislate concerning a matter within the exclusive jurisdiction of the provinces.

(c) **TREATIES.** Treaties are agreements made between independent nations. These may be treaties of alliance, treaties of peace, purely commercial treaties, and so on. The Constitutional Act provides that the Parliament and government of Canada shall have all powers necessary for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. These powers were exercised in the case of the Washington Treaty of 1871 between the United States and England, which settled disputes arising out of the American Civil War, the Canadian fisheries and other important matters.

(d) **PROVINCIAL CONSTITUTIONS.** The constitution of a province is the fundamental law by which it exists and upon which it builds its system of government. The Constitutional Act includes constitutional provisions for the provinces. A province may, within certain restrictions, amend its constitution.

Such amendments must not conflict, however, with the provisions of the Constitutional Act, with Dominion statutes, or with any treaties which the Dominion must observe.

(e) **PROVINCIAL STATUTES.** Each province may legislate freely concerning the classes of subjects assigned to it by the Constitutional Act. Its statutes must not conflict with Dominion legislation. Provincial statutes may merely re-enact pre-existing laws concerning the existence or scope of which there is doubt, repeal existing laws or create new laws. A glance at the revised statutes of any of the provinces will afford a good idea of the range and diversity of provincial legislation. As between a province and the Dominion, the residuary power lies with the Dominion. That is, where a fair doubt exists whether the Dominion or the province has jurisdiction in a given matter, the Dominion will get the benefit of the doubt. Under the American constitution the residuary power lies with the various states.

(f) **COMMON LAW.** "In its largest sense," says Sir Frederick Pollock, "the common law means the whole body of legal principle and usage which is common to all parts of England, and now to all jurisdictions whose law is of English origin." Custom exists as law in every country. The existence of custom or common law is generally proved by reference to decisions by which it has been affirmed, or to the writings of commentators who have appealed to it for guidance or authority. The common law then does not

depend for its authority upon statutes, treaties or constitutions. It is described as the "unwritten law," in the sense that the British Constitution is unwritten. It may be found in the written or printed decisions of the courts and in the pages of legal authorities, but it is still "unwritten" in the sense that it has not been reduced to statutory form or declared by statute to be law.

In so far as a given rule of common law is finally embodied in statutory form, it ceases to exist as common law and becomes statute law. For instance, the English Act relating to bills of exchange and promissory notes is largely a codification of old common law rules found in the customs and usages of merchants and in the decisions of the courts. The laws of the United States, with the exception of those of Louisiana, had their origin in the common law of England. Many of these laws have, of course, been formulated in Acts of Congress or of state legislatures. The same may be said of the English law provinces of the Dominion. It will be found that these provinces have frequently enacted that the law of England as it existed at a given date shall form part of the law of the particular province. Thus in Ontario, the laws of England as to property, civil rights and evidence, in force on October 15, 1792, were adopted.<sup>1</sup> In Manitoba the laws of England as to property, civil rights, evidence and procedure, as existing on July 15, 1870, were adopted by an act

<sup>1</sup> Consol. Stats. U. C., 1859, c. 9.

passed in 1874.<sup>1</sup> In British Columbia, English laws were declared to be in force by the proclamation of November 19, 1858, and this so far as those laws "are not from local circumstances inapplicable," and as modified by past local legislation.

It is unnecessary to go thru the list of provinces. Since these dates, English statutes have been expressly adopted in certain provinces. Thus the English Sale of Goods Act was adopted by the Northwest Territories and by Manitoba in 1896, and by British Columbia in 1897.

In Quebec the case is different. The conquest of Canada in 1763, while it replaced French public law by English public law, did not introduce English private law. The private law in force in Canada at that time was of course that of France.<sup>2</sup> Canada then included what are now Ontario (Upper Canada) and Quebec (Lower Canada). When Upper Canada was created in 1791, it at once proceeded to abrogate the French laws then in force, and introduced the laws of England. In Quebec, then, from the first settlement by the French in 1608, the common law has been the *Coutume de Paris*, except in commercial matters. This law has been greatly modified in the course of years by statute, and, as modified, is now found in the Civil Code of Quebec, which came into force in 1866. In commercial matters, when no provision is found in the Code, English rules of evidence apply. Sec-

<sup>1</sup> Man. 38 V. c. 12, s. 1.

<sup>2</sup> Walton, "Scope and Interpretation of the Civil Code," 26.

tions 4 and 17 of the English Statute of Frauds, with certain exceptions which will hereafter be explained, are also in force. Quebec commercial law, in so far as it is codified, is a blending of English and French commercial law. The English law and jurisprudence are, however, constantly and almost exclusively followed in commercial matters.

### REVIEW

Of what benefit is the knowledge of legal rights and obligations? How should the study of general law be approached?

Define law in its technical sense and classify technical law in two ways.

What is meant by municipal law and how does it differ from international law?

Explain public international law. Why is it not law in the technical sense; what is its field? Show, by an illustration, how a question of international law may arise between persons domiciled in different provinces of Canada.

What is the difference between public law and private law?

What are the six great sources of Canadian law and what does each cover? Differentiate between common and statute law.

# PART I: CONTRACTS IN GENERAL

## CHAPTER II

### NATURE AND CLASSIFICATION OF CONTRACTS

1. *Definition and general features.*—A contract is an agreement by which one or more persons bind themselves in favor of one or more other persons to give or to do or not to do something. It is essential to a contract that there be an agreement. A contract, to be valid and enforceable, must give rise to an obligation. An obligation is a legal bond by which one person is bound in favor of another to give or to do or not to do a certain thing. A true contract is, therefore, an agreement, but every agreement is not a contract.

If we may repeat, a contract must give rise to an enforceable obligation. The word “obligation” is derived from the Latin word *obligare*, meaning to bind together. Two persons are thus bound towards each other and in order that they shall be liberated, the bond must be severed by payment; that is, by the handing over of money, or the doing of something, or the refraining from doing something. In other words, the contract must be executed.

When we say that there is an obligation, we mean

that upon one of the parties to the contract a duty is laid, the fulfilment of which can be enforced by the other party. The distinction may be made clear by explaining that a moral obligation lacks this feature. A moral obligation cannot be enforced thru the courts.

In a famous case of Laidlaw vs. Sage,<sup>1</sup> this principle was clearly brought out. Russell Sage was in his office one day when a lighted bomb was thrown in thru the window. Terrified, he pushed his secretary between himself and the bomb, with the result that the secretary was seriously injured by the explosion. The latter brought action against Sage, claiming indemnity on the ground that he had saved Sage from great injury, and that he himself had been seriously hurt. The case was thrown out, on the ground that Sage acted in a moment of extreme panic, and on the ground that it was not proved that the secretary would not have been as much injured had Sage not acted as he did. There was no doubt that there was a moral duty on the part of Mr. Sage to compensate his secretary, but the court held that his obligation was an imperfect obligation.

In order that a true contract must exist, there must be:

- (a) Parties legally capable of contracting;
- (b) Their consent legally given;
- (c) Something which forms the object of the contract;

<sup>1</sup> 52 New England Reports, p. 679.

## (d) A lawful cause or consideration.

The matter may be expressed more simply by saying that there must be an agreement, and there must be a lawful obligation; that is, an enforceable obligation.

2. *Agreement in general.*—In order that a person shall be bound, he must have agreed to be bound. There must be a common intention. If the terms of the alleged contract are so doubtful or so contradictory that the court cannot ascertain definitely what the terms were, an action to enforce the contract will be dismissed, because of the inability of the court to determine whether there was a contract, or what were its terms. Thus if A asks B whether he will take \$200 for a certain horse and B replies, "Very possibly I will," there cannot be said to have been an agreement on the part of B that he would sell A his horse.

A person will be bound where he authorizes an agent to make a contract on his behalf, or he will be bound to pay the debts of a succession which he has accepted; by accepting he has contracted to take the assets and to pay the debts of the succession; he has acted by his free choice and voluntarily, and thus has come under an obligation.

A person may also come under an obligation by reason of some *quasi* contract. For example, if in paying an account A overpays, there is an obligation on the part of the person receiving payment to account for such overpayment. Under the French law,

tho apparently not under the English law, if a person discovers that the water-pipes in the house of his neighbor, which is closed for the summer, are burst, and he employs a plumber to repair them and stop the leak, he can call upon the owner of the house to pay him the cost of the work.

Similarly, a person may come under an obligation by reason of his tort, as it is called under the English law, or of his offence, or quasi-offence, as it is called under the French law. An offence of this kind arises by reason of a person's wilful wrongful act (offence), and as a result he must pay the damages which he causes, and generally these damages will be somewhat increased because of his wilful intention. Where the act is done involuntarily or in error (quasi-offence), he will be liable only for the actual damage caused: as, for example, where a druggist in mixing a prescription makes a mistake, there has been no wilful intention, and he will be liable only for the damages that can be proved. The case might be different if the mistake were due to gross carelessness.

*3. Classification of contracts.*—There are various classifications of contracts, which may be briefly expressed as follows. A contract may be an executed contract: that is, a contract the terms of which have been carried out; the obligation has been fulfilled or paid, and as a result has been discharged. The contract, in reality, by reason of its execution, has ceased to exist.

The contract may be executory: it has yet to be per-

formed. The contract may be bilateral, and both parties be bound to fulfil certain obligations. It may be unilateral, and one of the parties be bound to fulfil his obligation. A contract may be formal, in that it requires for validity to be made in some solemn form, as before a notary public or under seal; or it may be informal, and be a simple writing signed by one or both of the parties. An informal contract may be in writing; it may be expressed orally, in which case it will be subject to certain strict rules as to its proof. A formal contract in solemn form proves itself.

A contract may be valid, void or voidable. If valid, it is binding upon the parties to it, because it is in proper form, the proper consent of the parties exists, and there is a lawful cause and an object. If the contract is void, it is a contract only in name and cannot be enforced; neither party can hold the other to it. Thus if a person rents a house for immoral purposes, such a contract is void, and cannot be enforced. Where the contract is illegal and void, no action can be brought to compel the parties; damages cannot be asked for breach of performance; and generally, if money has been paid over under the contract, it can be recovered. Such contracts are said to be contrary to good morals and public policy. A contract may be voidable in that one of the parties may either consent or refuse to be bound by it. Thus if A sells a horse to a minor, the latter can buy it and pay the price, but he can refuse to pay the price or to carry

out his obligation to complete the contract by payment, or if he has paid and it can be shown that he has suffered injury by the bargain, he can have it upset and recover his money.

Contracts may be express, whether oral or written, when the terms of the contract are in so many definite words, and there is a distinct understanding. But the existence of a contract may be also implied, where from the conduct of the one or the other of the parties, or from the circumstances, it can be said that they intended to be or should be bound. Thus if a man holds another out as his agent for the performance of a certain act, or the making of a certain contract, and does not repudiate the act or contract made by his agent, he will generally be bound, in that his consent to what has been done or contracted will be implied.

#### REVIEW

Define a contract and show what a true contract must include. What is the difference between a moral and a lawful obligation?

What part does agreement play in a contract? Is a quasi-contract binding? What obligation arises out of an offense; a quasi-offense.

Distinguish between: (a) an executed and executory contract; (b) a bilateral and unilateral contract; (c) a formal and informal contract.

When is a contract valid; when void; when voidable?

## CHAPTER III

### FORMATION OF CONTRACTS: COMPETENCY OF PARTIES

1. *Requisites of a contract.*—We have already said that there are four requisites to the validity of a contract, namely, parties legally capable of contracting; consent legally given; an object; and a lawful cause or consideration. There must not be fraud, error or undue influence, such as threats or violence.

2. *Capacity.*—The common law rule is that every person is capable of making a contract, unless his incapacity is expressly declared by law. By capacity is meant that a person must be of age, he must be in his right mind and able to understand what he is doing, and he must not be excluded as falling within the classes described as incompetent. The following persons are subject to defective capacity:

- (1) Minors
- (2) Interdicted persons
- (3) Married women in certain cases
- (4) Persons insane or intoxicated, or otherwise unable to consent, owing to weakness of understanding.

3. *Minors.*—The legal age of majority is almost universally the age of twenty-one years. Persons under that age, both male and female, are infants in the eyes of the law, and while they may enter into con-

tracts, they cannot as a general rule be bound by them.

The contracts of a minor are voidable at his option. He has the privilege of refusing to be bound by his contracts, the idea being that as an infant he needs protection, and must be protected against his own acts, or against the acts of persons better able than he to judge of the benefit to be derived from a particular contract. An infant is, however, bound to pay for necessaries, tho no more than the reasonable value thereof.

4. *An infant's liability for necessaries.*—The term includes more than the mere food that will keep him alive, or the mere clothes that will keep him warm. Such food and clothes as are suitable to his station in life and to his particular circumstances at the time of the contract are covered by the term. Necessaries may, therefore, be food and clothing, medicines and medical attendance, at least a common school education—under certain circumstances even a college education, where this is not unreasonable, having regard always to the minor's station in life. But necessaries would not include mere luxuries, such as champagne, unless ordered by a doctor, or a fancy waistcoat, when he already has several. The term may include a watch, if the minor has not already one, especially if the watch is within the minor's means. It has been held to include a horse, a bicycle and a moderate amount of jewelry, under the same proviso. But articles of mere ornament and luxury, unless

luxurious articles of utility, would certainly be excluded.

If a minor buys a horse, under the advice of his doctor, for the purpose of exercise, the bargain would be binding if the price were reasonable. If he bought it for use in some business enterprise, it might be hard to consider it a necessary. Articles which he buys for the mere pleasure that they may give him, altho they may be useful, are not necessaries.

If a minor is living with his father or with a guardian who gives him all reasonable necessaries and supports him, the minor will not be liable if he buys other food and clothing on credit, and persons dealing with him do so at their peril. If they sue him, they must be able to show that the minor really needed the articles in question.

A minor who is married will be held liable for the necessaries supplied to his wife. A minor who has entered into the contract of marriage cannot be released from his contract on the ground of lesion—that is, on the ground that he has suffered injury.

*5. Legal obligations of minors.*—The common law rule is that a husband is liable for the debts of his wife contracted before her marriage, and a minor who is a husband apparently could not plead his infancy as a defence. In certain cases a minor may contract under the authority or direction of the law (as, for example, if he enlists in the army), and his contract will be enforced. So also if a minor is a mortgagee, and upon payment of the debt he reconveys the property,

he has performed a legal obligation, and is bound by his act. Ordinarily speaking, however, and with the exceptions we have discussed, a minor may at his option carry out his contracts or treat them as void, unless he has been properly authorized to make the contract. If he makes a contract for personal services, or enters into a partnership, or gives a promissory note, or buys or sells either movable or immovable property, he may refuse to be bound.<sup>1</sup>

6. *Disaffirmance by an infant.*—The general rule is that an infant may avoid his voidable contracts either before or within a reasonable time after becoming of age.<sup>2</sup>

It has been decided that a minor cannot deprive himself of his privilege of voiding, after he becomes of age, his contract made during minority. If an infant pays a sum of money under a contract, says Pollock, in consideration of which the contract is partly or wholly performed by the other party, he cannot acquire any right to recover the money by rescinding the contract when he comes of age.<sup>3</sup> So if he enters into a partnership agreement and pays a premium, he cannot, while he is a minor or afterwards, recover the premium. He may repudiate his contract in various ways; expressly, in writing or in words, or even by his conduct. If the contract is executory, that is, a contract under which he is bound to do some-

<sup>1</sup> This broad rule is subject to qualification in Quebec law, as explained in the next section.

<sup>2</sup> Pollock, Contracts, 8th Ed., p. 62.

<sup>3</sup> Pollock, p. 63.

thing, he may refuse to act, and if he is sued he may plead the fact of his minority. If he sells a property to one person, it would be a sufficient repudiation of his contract if after becoming of age he sold it to another person, tho in such case he would have to return to the first purchaser the money received from him.

If it can be shown, however, that the express contract which he has entered into is really for his benefit, he will be bound by it, or even sometimes where it is shown that it is not manifestly to his prejudice. Or if he enters into an agreement of apprenticeship or employs himself with a firm for a reasonable wage, he will be bound if he unlawfully absents himself from his employment. But it has been held that where a minor is allowed to make frequent journeys by a railway on special terms, and in consideration he waives any claim for accident that may occur, such a contract is harmful to him, and he is not bound. But supposing that he were to buy goods on credit, in order to take advantage of a rising market, his contract might not be manifestly disadvantageous, especially if he were of years of discretion; but he could void such a contract, at least at common law.

If a minor is a shareholder in a company and is in arrears for calls, he may, upon reaching his majority, be sued for the unpaid calls, unless he has repudiated his contract either before majority or within a reasonable time afterwards. It has been held in a Quebec case that a minor who has attained his majority

can be sued for the recovery of the amount of a promissory note made while he was a minor in payment of the first premium on a policy of insurance on his life, where he retained the policy, and where he took no procedure to annul the insurance contract. The insurance premium having been so paid, the insurance, it was held, stands in force for all purposes; and a minor, having attained his majority, can avoid a contract entered into during his minority only in so far as he proves legal injury or prejudice. That distinction brings out clearly the difference between the law of the Province of Quebec and that of Ontario and the other English law provinces. In the English law provinces, a minor's incapacity is greater than in the Province of Quebec. He can, as a general rule, get any contract, into which he has entered, set aside. In the Province of Quebec, the general rule is that he must show that he has suffered a prejudice by his contract.

If he has represented himself as being at the age of majority, it may be said as a general rule that he must restore any advantage he has obtained by reason of his misrepresentation, if he chooses to void his contract.

*7. Ratification.*—An infant cannot ratify before majority the contract which as an infant he could disavow, because his capacity for the one is no greater than his capacity for the other. His ratification should be in writing. If he ratifies his contract, he must ratify it as a whole; he cannot merely ratify what

he thinks will be of advantage to him, and repudiate the balance. Thus if he buys a piece of real estate and gives a mortgage for the unpaid balance, he cannot, upon becoming of age, ratify the purchase and repudiate the mortgage.

8. *Insane persons.*—The general rule may be laid down that the contracts of an insane person are voidable. The old rule was that he was unable to void them himself. If he has been legally declared insane, or as the result of an inquisition, he cannot deal with his property by deed, even in a lucid interval.<sup>1</sup> But a lunatic who has not been so found may contract during lucid intervals.

A person may be insane upon one subject, yet as regards other matters be quite capable of contracting. So far as concerns the subject of his insanity or delusion, he cannot contract, tho in other matters he may. A person, for example, who is insane upon the subject of religion, may be quite sane enough to protect his interests in the purchase of a horse.

9. *Disaffirmance by an insane person.*—During a lucid interval, or within a reasonable time after he becomes sane, a person who has made a contract while insane may repudiate it. If he has a guardian the latter may, during his insanity, repudiate the contract for him. If he dies, his personal representatives or heirs may do so. But the other party to the contract, as well as any third party, cannot disaffirm the contract.

<sup>1</sup> Pollock, p. 95.

The marriage of a lunatic is void. That he may validly enter into the contract of marriage, the same degree of sanity will be required of him as for making a will or any other contract. But the burden of proving his insanity will be upon him.<sup>1</sup>

10. *Return of consideration by the insane.*—If an insane person chooses to repudiate his contract, he must, if he can, tender back with his claim the consideration he may have received. If he cannot, there is authority for the view that he will not as a result be bound by his contract. If, for this reason, he could not relieve himself of the contract he made while insane, the rule which entitles him to void his contracts would be set at naught, and what he could not do directly would be forced upon him indirectly. The same weakness which led him into the contract may have led him to dispose of the consideration, and the law undertakes to protect him against his weakness. So if in a lucid interval he tenders back a watch which while insane he has bought, the vendor is bound to accept the watch and give him back the price. But if meanwhile he had lost the watch, the vendor would be bound to return the price.

In Quebec, generally speaking, contracts by persons of this class cannot be voided unless there has been lesion, that is, injury or loss suffered by such person and arising out of the contract. The code expressly declares that when minors, interdicted persons (which would include persons incapable, because

<sup>1</sup> Pollock, p. 95.

of some mental weakness, of making a contract) or married women are admitted in those qualities to be relieved from their contracts, the reimbursement of what has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been paid has turned to their profit. It is not for the incapable to prove that the bargain has not turned out to his profit, but for his opponent to prove that it has actually turned out to his profit.

11. *Married women.*—The old rule of the English common law was that a married woman could not, with rare exceptions, make a valid contract apart from her husband. This has been changed by statute. In the English law provinces, it may now be said that a married woman may deal with her separate property quite as freely as if she were unmarried and of age. Her contracts will bind her.

In Quebec, the general rule is that a wife cannot contract without her husband's authorization. If she is married without a marriage contract stipulating separation of property, her property and that of her husband fall into what is called a community of property. In theory, this common property belongs to both; but the husband is head of the community, and alone can say how the property, goods or money composing it, shall be spent or disposed of. His wife cannot, therefore, bind herself by contract without his consent, for otherwise he might find the property of the community, of which he is the virtual master and

owner, dispersed or dissipated by the wife's contracts.

In every province, excepting Quebec, when a woman marries she retains control and absolute ownership of all her property and of all she may earn or acquire. In Quebec, however, separation of property may be stipulated by marriage contract, and the wife will thus be and remain owner of all her property; but she cannot alienate her real property, tho she may administer it. She can deal with and dispose of her income; but as to capital, speaking broadly, she is subject to the authority of her husband. In the English law provinces, a wife may freely be a public trader. In Quebec a wife needs her husband's authorization to be a public trader (tho his consent will be implied where he knows what she is doing and does not protest); if she is separate as to property, she binds her separate property; if she is common as to property, she binds her husband also. In Quebec a wife cannot bind her separate property in any contract with or for her husband, saving the rights of creditors in good faith.

#### REVIEW

What are the requisites of a contract? What is meant by capacity? Who are subject to defective capacity?

Discuss the position of minors in relation to contracts. Are a minor's contracts void or voidable?

Discuss the liability of infants in regard to necessaries.

How may an infant disaffirm his contract? How and when may he ratify it?

What is the general rule concerning contracts of an insane person?

At common law could a married woman make a valid contract? Can she do so by statute?

## CHAPTER IV

### FORMATION OF CONTRACTS: THE CONTRACT ITSELF

1. *Offer and acceptance.*—It is essential to a contract that the parties thereto shall have come to some agreement. By this is meant that the parties are of one mind upon some proposed transaction, and that they have declared this fact. The purpose of both must be declared; the law cannot deal with the secret thoughts of men.

Hence if A is willing to sell his horse for \$500 to B, and B has made up his mind to buy the horse, if he can get it, but neither has referred to or discussed the matter, A and B are really of one mind on the subject. But there is no contract, for their wills have not met in a declaration of willingness to buy and sell.

So it is the declared will and not the secret intentions of the parties that the law will examine. If A offers to buy B's horse for \$500 and B accepts, A may have no intention of paying the money, but there is a valid contract. B takes his chance of being paid if he has not received cash or security. And A cannot be encouraged and assisted in getting out of his contract when he declares that he did not mean what he said.

The agreement of the parties is reached by means

of an offer and an acceptance. Neither need be in express or formal terms. Some promise or act or some course of conduct may be quite enough. If A advertises that he will pay a reward of \$5 for the return of his lost watch, he makes an offer of a promise for an act, and the finder upon presenting the watch and claiming the reward accepts the offer and is entitled to the reward. So a cabman at his stand must be ready to convey people about town. He offers an act for a promise to pay the amount which, by tariff, he can charge.

If a piano firm offers a man a piano for \$300, and the latter says he will give \$250, there is no contract, because the minds of the two have not met. But if the piano firm at once says it will accept the \$250, there is a contract. The acceptance of the offer clinches the bargain. Hence the acceptance and the offer must agree—the one must conform to the other. If the acceptance adds terms or conditions not contemplated in the offer, the so-called acceptance is rather a rejection of the offer. If A offered to buy a house from B on certain terms, possession to be had on July 25, B agreed to the terms, but fixed the date of possession as August 1, it would be held there was no acceptance. If A writes to B that he will pay him \$5,000 for his house, but B must accept by return mail, and B after waiting a week writes accepting, A is not bound to buy.

There is this to be said also that the offer must have in view the immediate formation of a contract by an

acceptance. For instance, a call for tenders for the building of a bridge or a warehouse is merely an invitation to builders or contractors to send in proposals which the person who intends to build may consider. Such an invitation is an offer to treat rather than a simple offer which may be at once accepted. The person offering to treat is not bound to accept the lowest or any tender. A rather interesting and difficult case was decided in England in 1893.<sup>1</sup> One Harvey telegraphed to the defendant, Facey, "Will you sell us Bumper Hall? Telegraph lowest price." Facey telegraphed: "Lowest price £900." Harvey replied: "We agree to buy Bumper Hall for £900." Facey did not answer this telegram, and refused to sell. He was sued, and it was held that tho Facey had quoted a price, he had not said he would sell. There was really no contract, because Harvey's "We agree to buy Bumper Hall for £900" was really the offer, and Facey did not acknowledge it.

*2. Offer and acceptance by mail or telegraph.*—An offer sent by mail or telegraph is not complete until it reaches the offeree. According to the English law it may be revoked at any time before it is accepted. Thus if A writes B offering to sell his house, A can withdraw his offer by telegram or by another letter which will arrive before the first. If when the revocation arrives the offeree has not made up his mind, the offer stands revoked. But if the revocation is merely on the way to the offeree, his acceptance of the offer

<sup>1</sup> Harvey vs. Facey, 1893, A. C. 552.

is none the less good. 'Until the revocation comes to the mind of the offeree, he is entitled to accept the offer and to treat it as expressing the mind of the offerer. While the French commentators do not as a rule accept this view, the French courts will allow damages where the revocation of an offer causes loss. In Quebec the English rule would probably be followed, the balance of convenience in all commercial transactions, apart from the strict theory of the law, being distinctly in favor of its application.

Where, however, an offer has been accepted and the acceptance posted, the acceptance cannot be revoked. The acceptance might have gone by mail and the revocation by telegraph. The telegram may have arrived first, and the offerer known of the revocation before he knew of the acceptance, and he may thus have suffered no prejudice. He can hold the offeree to his original acceptance. Pollock, commenting on this rule, says:

This is a startling consequence at first sight, but the hardship is less than it seems, for a party wishing to reserve his freedom of action as long as possible will still have two ways of doing so: he may make his acceptance in writing expressly subject to revocation by telegraph, or he may abstain from answering by letter at all, and only telegraph his final decision.

While the revocation of an offer must be made before it has been accepted and must be received before the acceptance is posted or telegraphed, apparently the offer is revoked by the death or insanity of either party.

3. *Offer to the public.*—An offer may be made to the public in general. That is, it need not be made to an ascertained person. But it will be binding where it is accepted by an ascertained person. Thus a shop-keeper who exposes a certain silk in his window with a price affixed, will be bound to sell the silk at that price to anyone who on the strength of what he has seen in the window wishes to buy. The hotel keeper and the common carrier make a continuing offer to the public, and unless they have exceptional reasons for refusing to receive a certain person, they are bound to receive all comers, at least up to their capacity.

If a reward is offered thru the newspapers for the capture of a fugitive or the finding of lost property, the reward will be due to the person who with knowledge of the offer captures the fugitive or finds the property. A person who had no knowledge of such an offer could not claim the reward if before knowing of it he gave the desired information. But if, without knowledge of the offer of a reward at the time a person finds lost property, before handing it over he learns of the offer, then he can claim the reward.

Pollock refers to an interesting English case decided in 1893. A company called the Carbolic Smoke Ball Company advertised an offer to pay £100 to anyone who contracted influenza after using its smoke balls according to directions. The plaintiff, one Carlill, read the advertisement and so induced bought a smoke ball and used it according to directions. Unfortunately for him, or rather for the company, he

contracted influenza after using the remedy, and it was held in his favor that there was a valid contract arising out of an offer and an acceptance.

An offer by public advertisement may, it appears, be revoked by an advertisement equally public. The Supreme Court of the United States has so held,<sup>1</sup> and even as against a person who afterwards acts on the proposal not knowing that it has been revoked, "for he should have known that it could be revoked in the manner in which it was made." Sir Frederick Pollock says of this decision:

In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. This may be a convenient rule, and may perhaps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind: yet it seems a rather strong piece of judicial legislation.<sup>2</sup>

**4. Consideration.**—In the English law provinces, as in England and in the United States, a contract is valid only if it is based upon a valuable consideration. It may be valid, however, in those jurisdictions where sealing is necessary, if made by a deed or writing under seal, when the contract is said to be valid without consideration.

What may be consideration is well defined in an English case;<sup>3</sup> "either some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or

<sup>1</sup> *Shuey vs. United States* (1875), 92 U. S. 73.

<sup>2</sup> *Pollock*, p. 23.

<sup>3</sup> *Currie vs. Misa* (1875), L. R. 10, Ex. at p. 162.

undertaken by the other." The party who accepts the consideration may or may not get any apparent benefit. It is sufficient if he accepts it. By some act or forbearance, or the promise thereof, A buys the promise of B, and B's promise is thereby made enforceable. A mere moral obligation will not support a promise, and cannot be enforced. In this view of the law, therefore, a promise to contribute money to charity is not a contract at all, at least under the English law.<sup>1</sup>

The civil law of Quebec distinguishes "cause or consideration" from "consideration" as we have just been viewing it. In Quebec it is said that if the contract has an object, it may be enforced, tho the promise was given without consideration. By object is meant "what is due." Thus if A lends a book to B, the object of the loan is the book—what is due; the cause of the borrower's obligation—i.e., why there is a debt on his part—is his receipt of the book. The *cause* is the immediate end of the parties—that which impels every buyer, every seller, every lender and giver. This "immediate end" in the case of the seller is the price; in the case of the buyer it is the legal obligation of the seller to give him delivery and warranty; in the case of the giver (and here the theory is strained) it is the desire of the giver to give. The word "consideration" is used rather as an equivalent for "cause."

In actual practice, however, "consideration" is used

<sup>1</sup> Pollock, p. 176.

almost exclusively. It is impossible to pursue the theoretical difference any further in this book; to do so would perplex the layman. But a word further may be said to show that there is a real distinction.

We said above that a promise to contribute money to a charity—a pure gratuity—is not a contract in English law, because there is no consideration. The giver gets no *quid pro quo*. In the theory of the French and Roman law, there is a contract because there is a *cause*—the desire of the giver to give or his satisfaction or pleasure in giving. There is an object—that is, something due—the money he has promised.

5. *What may be a sufficient consideration.*—It may be stated as a general principle that the adequacy of the consideration will not be inquired into. “The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give.”<sup>1</sup>

The consideration may consist in “some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or other responsibility given, suffered, or undertaken by the other.” The Supreme Court of the United States has held that the release of a supposed right of dower (a wife’s interest in her husband’s real estate), which the parties thought necessary to confirm a title, is a good consideration for a promissory note. Forbearance to prose-

<sup>1</sup> Hobbes, Leviathan, pt. 1, c. 15. Cited by Pollock, p. 184.

cute a meritorious claim made in good faith may also be sufficient.

But if a person is legally bound to do a certain thing, a promise to do it is not a sufficient consideration. Thus part payment of a liquidated claim which is due is no consideration for a promise to forego the balance. But if A out of charity does some kindly act for B, and the circumstances are such that B could have had no intention of paying for what is done, a promise on his part to pay will not be implied. But a promise will not be binding if based upon a consideration which fails or which is non-existent. The rule may be different where, for instance, a piece of property is bought, and both vendor and purchaser understand that the title is doubtful, and it proves to be faulty.

If the consideration is illegal, it will not support an action. If the parties contract about something which they believe exists, but which really does not, there is no contract. Thus if A in Montreal sells a horse which is in Toronto, but unknown to him the horse is dead, there is no contract. Similarly if A insures B's life in which at the time he has an insurable interest, but unknown to him B is dead, the policy is void. But A who has a ship at sea may insure it "lost or not lost," provided he does not actually know it is lost at the time; and the insurer will be bound tho the ship may have been lost when the contract was made. A could make a contract to buy an automobile to be made a year hence; or he could sell a

crop of hay which he expects next season. If A promises B \$10 provided he will not drink or smoke for a month, there is a sufficient consideration.

6. *The Statute of Frauds.*—The English Statute of Frauds was enacted in 1676. In the United States and Canada, provisions similar to those of the English Statute of Frauds are in force. Their purpose is to prevent frauds and perjury in the proving of contracts. The general rule is that a contract must be proved by a writing. But there are exceptions to the rule:

(a) A contract may be proved orally if the written contract is lost by unforeseen accident, or is in the possession of the adverse party or of a third person and cannot be produced.

(b) A commencement of proof—i.e., a writing which, tho it does not set out the contract, makes its existence probable—may be sufficient. This is the “note or memorandum” of the English statute.

(c) A writing is not necessary if the amount in question does not exceed fifty dollars.

(d) If the adverse party admits the contract under oath, no writing is necessary.

There is a further exception, that any facts concerning a commercial matter may be proved orally. But if the amount in question is over fifty dollars, a writing will be necessary, in Quebec, even in commercial matters:

(a) Upon any promise or acknowledgment whereby a debt is taken out of the operation of the

law respecting the limitations of actions. Thus, by the law of Quebec, for example, a promissory note is prescribed or outlawed in five years. If a plaintiff is to succeed in an action upon a note made more than five years before the action is taken, then he must allege and prove by a writing signed by the defendant that the latter has acknowledged his indebtedness and promised to pay it. If an amount had been paid on account and the amount was written on the back of the note and initialed by the debtor, that would be sufficient proof that he regarded the note as still unpaid and payable.

(b) A promise to answer for the debt, default or miscarriage of another person must be in writing.

(c) A minor after attaining his majority may ratify a contract made during his minority. His ratification cannot be proved unless it is in writing.

(d) In the case of a contract for the sale of goods exceeding \$50 in value, the contract cannot be proved unless the buyer has accepted or received part of the goods or has given something in earnest to bind the bargain.

The two sections of the English statute relating particularly to contracts may be briefly summarized. Section 4 states that the following promises or contracts to be enforceable must be in writing and be signed by the debtor:

(a) Any promise of an executor or administrator to pay out of his own estate any debt due from the estate he is administering.

- (b) Any promise to answer for the debt, default or miscarriage of another person.
- (c) Any promise to perform some act, such as to transfer property or pay money, in consideration of marriage.
- (d) Any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them.
- (e) Any contract which by its terms is not to be performed within the space of one year from the making thereof. For example, a lease for more than one year must be in writing.

The seventeenth section provides that:

No contract for the sale of any goods, wares, or merchandise for the price of ten pounds sterling, or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same; (2) or give something in earnest to bind the bargain; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

#### REVIEW

What are the vital features of offer and acceptance?

When is an offer sent by mail or telegraph complete? When may it be revoked? May a posted acceptance be revoked?

Must the party to whom the offer is made be ascertained? If an offer is made to the public, when does a contract arise? Must the party performing the service have knowledge of the offer? How may an offer by public advertisement be revoked?

Define consideration. Of what importance is it? Is a moral obligation enforceable? What is the law concerning consideration in Quebec?

Is the value of a consideration important? If a person is

legally bound to do a certain thing, is a promise a sufficient consideration? May an action be supported by an illegal consideration?

What is the Statute of Frauds and what are its important provisions?

## CHAPTER V

### FORMATION OF CONTRACTS: VOID AND VOIDABLE CONTRACTS

1. *Legality of object.*—The law may prohibit the doing of certain things, or certain acts may be contrary to public policy. If an agreement has an object which is thus contrary to law or public policy, an enforceable contract cannot result. The contract cannot be enforced, damages would not be allowed for non-performance, and what has been paid under the contract may be recovered. Hence if the performance of a given contract would consist in doing such forbidden act, or an act contrary to public policy, the law will not exact performance, nor will the parties be entitled to ask the aid of the law. Such contracts are void, in that they are illegal. If the contract then involves some violation of rules of decency, morals or good manners, the law will take notice of the mischievous nature of such an agreement, to the extent of refusing to recognize that any legal right can arise out of it. As was said in a leading case:

A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it.<sup>1</sup>

Such agreements are void as being immoral. Then

<sup>1</sup> Cowan vs. Milbourn, 1867, L. R. 2, Ex. p. 236.

there are agreements which are void as being against public policy: for example, agreements concerning matters touching the good government of the commonwealth and the administration of justice, or concerning matters affecting particular legal duties of individuals whose performance is of public importance, or concerning things which are lawful in themselves, but which are such that individual citizens cannot, without general inconvenience, be allowed to set bounds to their freedom of action in connection with them as freely as they may with regard to other things.<sup>1</sup>

An agreement is also void which provides for some act involving the commission of a civil wrong: for example, an agreement of a debtor to defraud his creditor, or an agreement to carry out some fraudulent scheme and divide the profits. A debtor in difficulties who makes a compromise with his creditors, at, say, fifty cents on the dollar, cannot secretly agree with one creditor that the latter shall get some preference over other creditors; such an agreement could be upset. This was well laid down in an English case, as follows:

Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor, in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no ad-

<sup>1</sup> Pollock, p. 288.

vantage from it, but he is to lose the benefit of the composition.<sup>1</sup>

It is a general rule of public policy that persons who are of full age and in the possession of their faculties should be allowed to contract freely. A person may make a foolish bargain, but the courts will not, as a matter of public policy, declare such contracts void, tho of course if the party to the contract comes within one of the classes we have above considered, for example, minors or insane persons, the court will then interfere. When a contract is set aside as being contrary to public policy, what is meant is that the contract belongs to some class of contract which has long been recognized by the law as unlawful. Lord Halsbury said in a recent case:

I do not think that the phrase "public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. I deny that any court can invent a new head of public policy. A contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or the assisting of the King's enemies, are all undoubtedly unlawful things; but it is because these things have been either acknowledged or assumed to be by the common law unlawful, and in case a judge or a court have a right to declare that such things are, in his or their view, contrary to public policy.

**2. *Wagering contracts.***—Wagering contracts, tho they were at one time enforceable under the common

<sup>1</sup> *Mullalieu vs. Hodgson*, 16 Q. B. D. 689.

law, are now by statute illegal. A wagering contract is one by which one party agrees to pay another money or property upon the happening of some uncertain event. There is no right of action for the recovery of a bet claimed under a gaming contract, and if the losing party has paid over the money he cannot get it back, unless he proves that there has been fraud. The law thus endeavors to discharge gambling. Buying stock on margin has been held not to be a gambling contract, tho betting in a bucketshop is. In a bucketshop transaction the broker does not buy the stock; he merely makes a bet for his client that the stock will rise or fall, and it is a gaming contract. But a broker who buys and sells shares for a client, altho on margin, actually buys the stock. The contract is not a gaming contract, altho the broker may know that his client is not investing, but is merely speculating, and that the client has really insufficient means and should be saving rather than risking his money.

A contract of insurance, altho it is in the nature of a wagering contract, is enforceable; so also are contracts for the sale and delivery of commodities at different prices. The actual intention of the parties will decide whether or not the contract is a gaming contract and, therefore, illegal. Thus if goods are bought subject to delivery at a future date at a fixed price, but it is agreed that the goods shall not be delivered or the price paid, with the understanding that when the time for purchase arrives, the intention is

merely to make a settlement by one party paying the difference between the market price and the contract price, such a contract is a gaming contract and illegal. A note given in payment of such a settlement would be void.

3. *Usurious contracts.*—By statute the legal rate of interest in Canada is fixed at five per cent, where the agreement does not fix the rate. The maximum rate is also fixed by statute, and any excess over this maximum is usury. The Bank Act provides that a bank may stipulate for any rate of interest or discount not exceeding seven per cent per annum, and may receive and take any advance in such rate, but no higher rate of interest shall be recoverable by a bank. By the Money Lenders Act, any lender who shall stipulate for, allow or exact on any negotiable instrument, contract or agreement concerning a loan of less than five hundred dollars, a rate of interest greater than 12 per cent per annum, is liable to one year's imprisonment, or a penalty of one thousand dollars. If a judgment has intervened, the rate is reduced to five per cent. A bona fide holder, before the maturity of a negotiable instrument discounted by a preceding holder at more than 12 per cent, may recover the amount thereof, but the party paying may reclaim the excess from the money lender.

4. *Contracts in restraint of trade.*—The general principle is that contracts which unreasonably restrain trade are void. It is contrary to public policy for a man to contract not to engage in business at all.

There may be circumstances, however, which make it reasonable that a man should undertake not to engage in a particular business for a certain length of time. Thus if a man sells a business and he undertakes not to carry on any business which will compete with that which he has sold, he may obtain a better price, and such a contract, if not otherwise unreasonable, will be maintained. Even then, however, the restraint must not be wider than is reasonably necessary. A restraint of this kind may be more reasonable now, with our modern means of transportation, than would have been the case fifty years ago. Such a restraint is not necessarily unreasonable because it is unlimited as to space. Thus in a leading case in England,<sup>1</sup> Mr. Nordenfelt, who was a manufacturer of guns and explosives, and who supplied them to the various governments of Europe, sold his business to Maxim Nordenfelt & Company, Limited, and undertook not to compete with the business for twenty-five years. There was no restriction as to space. The sale was made in England, and later Mr. Nordenfelt began business again in Belgium. The House of Lords held that the restraint in this case was not unreasonable, and that he was bound by his contract.

So also in another case recently decided by the House of Lords, where a man was employed to sell clothing on the instalment plan, and he entered into a contract for three years, and bound himself that upon leaving his present employ he would not work

<sup>1</sup> *Nordenfelt vs. Maxim Nordenfelt & Co.*, 1894, A. C. 535.

for any competing firm or in the clothing trade for a year at any place within twenty-five miles of the employer's place of business, or within twenty-five miles of any place where it might do business, the contract was held unreasonable and void. Under the contract, it was pointed out, the employer might have dismissed the man at any time, and if the contract were good the employee would find himself unable to earn a livelihood by perhaps the only business he knew.

In Quebec, an injunction has been refused to restrain a bread driver from employing himself with a competing firm, altho he had bound himself to his employer for a certain period, and had agreed that he would not engage in the bread business or in the soliciting of orders for bread for a certain period in the City of Montreal. It was held that his services were not of such a unique and unusual character that he could not be replaced, and that any loss that might be caused by his leaving could be reasonably and adequately compensated for in damages. Apparently, however, it is not a restraint of trade for a dealer in liquors to bind himself to sell only the liquors of a certain firm.<sup>1</sup> The general rule, as laid down in the Nordenfelt case, is that the restraint must not be greater than is reasonably necessary for the protection of the parties, and so as to be contrary to public policy.

5. *Unlawful combinations.*—Combinations in restraint of trade are unlawful and criminal. Thus

<sup>1</sup> Gervais vs. Paquette, 1907, 37 Que. S. C. 501.

combinations between dealers in staple commodities to control and increase the price by decreasing the production or competition are illegal and void. The law may be stated as follows: Everyone is guilty of an indictable offence and liable to a penalty not exceeding \$4,000 and not less than \$200, or to two years' imprisonment, or if a corporation, to a penalty not exceeding \$10,000, who conspires, combines, agrees or arranges with any other person or with any railway, steamship, steamboat or transportation company; (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; (b) to restrain or injure trade or commerce in relation to any such article or commodity; (c) to unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. This rule, however, is not construed to apply to combinations of workmen or employes for their own reasonable protection as such workmen or employes. As a combination in restraint of trade is illegal, the Supreme Court of the United States has held that parties to it have no standing in court, and the court will not assist in enforcing such contracts. In the United States, however, it has been held illegal

for workmen to combine to enhance the price of their labor. For example, it was said in an Illinois case:<sup>1</sup>

All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographical work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but so far as it goes it is precisely of the same character, produces the same results and is subject to the same legal objection.

Greenhood, on Public Policy, points out, however, that where the means contemplated and the objects sought are not unlawful, combinations of workmen to control the price of their labor or skill are not necessarily illegal. He says:

Combinations of artisans for their common benefit, as for the development of skill in their trade, or to prevent over-crowding therein, or to encourage those belonging to their trade to enter their fold, or for the purpose of raising the prices of labor, are valid, provided no force or other unlawful means be employed to carry out their needs, or their object be not to impoverish third persons, or to extort money from employers, or to encourage strikes or breaches of contract, or to restrict the freedom of members for the purpose of compelling employers to conform to their rules.<sup>2</sup>

<sup>1</sup> Moore vs. Bennett, 149 Ill.

<sup>2</sup> Greenhood, Public Policy, Rule 546.

In an American case, where a wallpaper company sued to recover the price of wallpapers which it had supplied, the defendant pleaded that the company was a combination in restraint of trade.<sup>1</sup> It was clear from the evidence that the company had a monopoly, and that it was really an illegal combination of factories in the wallpaper trade. The Supreme Court pointed out that to give judgment in favor of the company would be to legalize and make effective the illegal agreement constituting the monopoly, and the court said:

Such a judgment cannot be granted without departing from the salutary rule long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to enforce or to realize the fruits of an agreement which appears to be tainted with illegality, altho the result of applying that rule may sometimes be to shield a defendant who had got something for which, as between man and man, he ought perhaps to pay, but for which he is unwilling to pay. In such cases the aid of the court is denied, not for the benefit of the defendant, but because it should be denied without regard to the interests of individual parties.

A case was recently decided by the Supreme Court of Canada, on an appeal from Manitoba. Two junk dealers, who had practically a monopoly of this trade in Manitoba and elsewhere in the West, agreed to fix the price which they would pay for junk of various kinds. The agreement rendered their business more profitable than ever, and under it they were to divide

<sup>1</sup> Continental Wallpaper Co. vs. Voight. Decided Feb. 5, 1909.

the profits. One sued the other to account for profits, but it was held that no action would lie, because the agreement was really an illegal combination under the statute.<sup>1</sup>

6. *Contracts made on Sunday.*—The common law rule is that contracts made on Sunday are valid. In England, the United States and certain of the Canadian provinces, however, contracts are generally illegal if made on Sunday. The Bills of Exchange Act, for instance, provides that a bill is not invalid by reason only that it bears date of a Sunday, or other non-juridical day; but apparently if the bill were given in pursuance of a contract which under the statute may be illegal if made on a Sunday, it would be void as between the immediate parties, and as to any person who takes it with notice; but the mere fact that it is dated on a Sunday would not be such a notice.

Under a Dominion statute<sup>2</sup> it was made unlawful for any person to carry on or to transact any business of his ordinary calling, except works of necessity or mercy, on the Lord's day, but this act goes on to provide that it shall not affect any existing provincial law on the subject. The act apparently would not apply in a particular province where, under the provincial law, druggists, tobacconists and fruit dealers kept open on Sunday. What may be a work of necessity or charity is a question of fact in each case, but any-

<sup>1</sup> Weidman vs. Shragge, 1912, 46 S. C. R., p. 1.

<sup>2</sup> 6 Ed. 7, Chap. 27 (now R. S. C., Chap. 153).

thing done to save life or preserve health or property, which must be done on a Sunday or not at all, would probably be considered a work of necessity. So also any act, the object of which is to relieve distress or suffering, or which relates to religious worship, would be an act of charity.

It has been held in American cases that notes, deeds and mortgages which are signed on a Sunday, but which are not delivered on that day, are valid; but that on the contrary, if signed on a secular day and delivered on a Sunday, they are void, saving the rights of a bona fide holder for value of a negotiable instrument.

*7. Contracts in restraint of marriage.*—Contracts in restraint of marriage are generally held to be against public policy, and are therefore void. A contract not to marry a certain person, or not to marry anyone before attaining the age of twenty-one, or perhaps twenty-five, may be valid, in that it does not restrain marriage in general; but a contract not to marry anyone but a particular person would be void. A widow or widower may contract not to marry a second time, but a person may not contract to remain unmarried. A contract not to marry without the consent of parents, or during minority, would be valid, because the restraint is not unreasonable. A contract not to marry a Hebrew or a Roman Catholic would be valid. A contract not to marry until one has attained the age of forty would be invalid, because it discourages matrimony. A bet by one person that he

will not marry within a certain time is a wager, and void.

Agreements to procure or negotiate marriage for reward, known as marriage brokerage contracts, are held to be contrary to public policy, and therefore void. Pollock remarks<sup>1</sup> that all such agreements are void, whether for procurement of marriage with a specified person, or of marriage generally, and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely of no consideration, but an illegal consideration for a subsequent promise of reward. It was said in an English case:<sup>2</sup> "Both ladies and gentlemen are frequently induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life, at the will of the most inexorable jailers—disappointed lovers."

8. *Contracts in fraud of third persons.*—A contract is void if it tends to induce some third person to commit a breach of trust, or if it tends to defraud a third person. Contracts are opposed to public policy if they are opposed to open, upright and fair dealing, and contracts are void which place a person under an inducement to violate a confidence reposed in him, or which place him under a wrong influence, or under a temptation which injures the rights of third persons.

<sup>1</sup> Pollock, p. 366.

<sup>2</sup> Wilm, 371.

Thus an agreement to divide the profits of a fraudulent scheme, or even to carry out some lawful object by means of an apparent trespass, breach of contract or breach of trust, is void. Thus, if A and B are interested in common with other persons in a transaction which requires the good faith of all persons interested, and A and B make a secret agreement which is intended to benefit them at the expense of the others, the agreement is void. Or if B, upon application of A, agrees to advance money to enable him (A) to buy certain goods of C; B goes to C and pays him the money agreed upon, in order that A may get the goods; A and C agree that A shall pay a further sum: this agreement between A and C is void, as it is a fraud upon B, who intended to relieve A from paying any part of the price.

9. *Contracts against liability for negligence.*—It is difficult to express a rule of universal acceptance in Canada upon this subject. According to French law, it is very doubtful whether a man may stipulate for freedom from the consequences of his ordinary negligence. Against his wilful negligence, which is assimilated to fraud, it is said that he cannot stipulate. A person may stipulate, of course, that he will not be liable for loss under circumstances. Thus if a repairer of antiques is asked to repair some very fragile article, he may stipulate that he will not be responsible if the article goes to pieces in the course of repair. The effect of the various Workmen's Compensation

Acts, whatever may have been the law before, is to prevent employers stipulating against liability as toward workmen.

At English common law, it is said that in the absence of statute to the contrary, a carrier may stipulate for total exemption from liability for negligence. In the English law provinces, this rule has in several instances been altered by statute. In Quebec, under the authority of a decision of the Supreme Court, a carrier may stipulate by express contract that he shall not be liable for the negligence of his employees or servants.

The rule laid down by the Dominion Railway Act is, however, that a railway, that is, a Dominion railway, cannot contract itself out of liability for its negligence or that of its servants by any notice, condition or declaration. A company may, however, with the approval of the Railway Board, stipulate that its liability be limited to a fixed sum, even in case of negligence. It may also stipulate that unless notice of claim is given to it within a certain delay, it shall not be liable. Ordinarily, carriers are liable as insurers of goods carried. In other words, a carrier is bound to deliver in good condition articles received and carried by it, tho there be no negligence on its part. It is evident that the carrier may contract against this liability.

10. *Effect of illegality.*—Whether an illegal stipulation in a contract will void the contract as a whole or only in part will depend upon the circumstances.

It is not sufficient to assert merely that an unlawful agreement cannot be enforced. Where there is a lawful promise made for a lawful consideration, the contract is not necessarily void because there is an unlawful promise made at the same time for the same consideration.

It is well established that if in a deed, for instance, there are certain covenants or conditions which are good and lawful, and others which are contrary to law, the latter will be struck out and the former will stand good. That is, where there are distinct engagements in a contract by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law the performance of those which are legal may be enforced, tho the performance of those which are illegal cannot.<sup>1</sup>

It has also been laid down that where a transaction which is partly valid and partly invalid is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part, the party who is called upon to perform his part of the agreement, which is on the face of it valid, will not be allowed to urge that the transaction as a whole is unlawful and void. If the illegal cannot be separated from the legal part of the covenant, the contract is entirely void, but if they can be severed, the bad part may be rejected and the good part retained.

Thus Kent lays down that "if the part which is good depends upon that which is bad, the whole is

<sup>1</sup> *Bank of Australasia vs. Breillat*, 1847, 6 Moo., P. C. 152.

void; and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract so entire, that there can be no apportionment, the contract is void."

Where any part of a single consideration for a promise or set of promises is unlawful, and the consideration cannot be severed so as to assign a lawful consideration to any of the promises, the contract as a whole is void. The immediate object or consideration may not be unlawful, but the intention of one or both parties in making the contract may be unlawful, in which case there are two possibilities: if the unlawful intention when the contract is made is shared by both parties, or is entertained by one to the knowledge of the other, then the contract is void; if one of the parties, unknown to the other, has an unlawful intention when the contract is made, it may be voided by the innocent party, if he discovers the intention before the contract is executed.

Thus if the lessee of a house, which he knows is used by the tenants for immoral purposes, assigns the lease, and he knows that the person to whom he assigns it intends to continue the same use, he will not be allowed to recover on a contract made by the person to whom he assigns the lease to indemnify him against the covenants of the original lease.

A person who owns a property and who has undertaken to sell or lease it, but who finds that the purchaser or lessee intends to use it for unlawful

purposes, is entitled and may even be bound to rescind the contract. It has been laid down that he need not even give his reasons for doing so, as he may justify his refusal later. But where a contract has been completely executed, as for example by the transfer of property, the consideration may be paid or the transfer may have been made for some unlawful purpose of which both parties were aware, but once executed it cannot be set aside. Thus in an English case, where two promissory notes were secretly given to a creditor by a debtor who was making a compromise with his creditors, the notes being in excess of the amount of the creditor's rightful composition share, judgment was given on one of the notes; a third person intervened and gave the creditor a guarantee for the amount involved, upon the creditor's staying proceedings. An action on this guarantee was dismissed.

If a school teacher who has not the proper license undertakes to teach and does teach in a school for a number of months at a good salary, he will not be entitled to recover for his services. A doctor who practises without the necessary license or qualification would be in the same position. The sale of tobacco may be prohibited by statute on a Sunday; a tobacconist who sold tobacco on a Sunday on credit would not be entitled to collect.

A director of a railway company cannot have a private interest in a contract with the company. Thus if a director of a railway company which is putting up a building makes a secret partnership with the

contractor who is doing the work, his contract is illegal, and he could not sue his partner for a division of profits.

It is illegal to pay money or undertake to pay money to avoid or prevent the prosecution of a criminal. Thus the Court of Appeals of the Province of Quebec has held that where a bank clerk embezzled money and his father gave the bank a note to cover the amount stolen, on the condition that the bank would drop the prosecution, and the bank accepted the note and went no further with the case, the note could not be collected.

A contract by which a Member of Parliament accepted money in return for his promise to vote as he might be directed by another person would be illegal.

Contracts between a lawyer and his client which stipulate that the lawyer, if the action is successful, will accept for his services a share of the money recovered, are illegal. Such contracts are deemed illegal because the lawyer, tho entitled to a reasonable fee, is able to judge of the outcome of the case, and hence the client is at a disadvantage.

If a person sells a grocery business and contracts that he will not, during a period of five years, engage in the grocery business in the same town, such an agreement is reasonable, is not in restraint of trade, and is, therefore, valid; but if the seller agreed that he would not engage in the grocery business for the same period in any place in Canada, the contract would be unreasonable and void.

A loan to a person to enable him to run a bucket-shop, it being agreed that the lender is to receive a share of the profits, would be illegal.

In certain jurisdictions, steamboat excursions may be prohibited on a Sunday. The captain or engineer or other person who assisted in running the excursion would be unable to collect his wages.

11. *Reality of consent.*—As we have seen, the consent of the parties to a contract must be expressed in some way. The minds of the parties must meet, but there must be something which indicates the fact. In other words, the consent must be real. The consent may, therefore, be unlawful or defective owing to mistake, misrepresentation, fraud, undue influence or duress.

Where a party to a contract can show that he gave his consent without understanding the nature of the contract, or the thing about which he was contracting, or something which was the principal consideration for making the contract, he may have it set aside. He may be able to prove fraud or misrepresentation by the other party, or show that by some form of violence he was coerced into making the contract. In a sense the contract is good, but a person who has been led into it by error or fraud may have it declared void if he takes steps to do so before his right is prescribed.

If a person, who has made a contract under any of the above circumstances, ratifies the contract or acquiesces in it, he will not then be allowed to set it

aside. In certain cases, however, as for example in the case of a promissory note, the maker may have signed in error, or as a result of some fraud or misrepresentation, but if the note gets into the hands of a third party who in good faith without notice of the defect gives value for it, the maker will be bound toward such third party.

12. *Mistake or error.*—A mistake may be one of fact or of law. A mistake of fact may be either of intention or expression. If the parties to a contract do not mean the same thing, or one of them forms an untrue conclusion as to the subject matter of the contract, there has been a mistake of intention and the contract is void, because the minds of the parties have not met.

Thus A may lend a horse to B, and B may think that A is giving it to him: there is no contract of gift. A man may sign a paper by which he purports to subscribe for shares in a company, and he pays \$500. At the time he thought that he was subscribing for five fully paid-up shares. In the contract as drawn up he appears to subscribe for fifty shares of \$100 upon which he pays \$10 each, or \$500 on account. Such a contract has been set aside. Or if a man signs a promissory note and thinks it is merely an order for certain goods, he will not be bound by his mistake.

Where one party is ignorant of the subject matter of the contract, the law requires the other to disclose all the material facts of which he has knowledge. So also if goods are bought in reliance upon the judg-

ment of the seller, and the buyer finds that goods are shipped to him which he did not intend to buy, he is not bound by his contract. If a man buys a quantity of goods and he intends to buy one hundred pieces, and the other party thinks that he is buying five hundred pieces, or the buyer thinks that he is paying \$1 and he is actually charged \$2, there has been no consent as to the subject matter of the contract, and the contract is voidable. So if a man buys plated goods in mistake for silver, or buys a modern reproduction which he thinks is an antique, he may have the contract set aside. If a person pays down a sum of money for some secret process, say, for the manufacture of ginger ale, and it turns out that there is no secret, he will not be bound. It is different if a man buys a picture from a dealer by some unknown painter, and he believes it to be a Rembrandt, without the dealer's declaring it to be a picture by Rembrandt. The buyer will then be bound. There was no guarantee, and the buyer bought in doubt. His purchase was really a speculation.

A contract is not necessarily invalid because there has been a mistake of expression. The expression may be corrected, where the minds of the parties have met, but their intention has not been exactly set out. A mistake of law does not void a contract. Thus a man may make a contract by which he sells a certain thing, and by law the sale of it carries with it its accessories; he cannot have the contract set aside on the ground that he did not intend that the accessories

should go with the thing sold. He may accept a succession, ignorant of the fact that by accepting it he accepts also the liabilities attached thereto.

**13. *Misrepresentation and fraud.***—To constitute misrepresentation or fraud sufficient to set aside a contract, there must be proof of an intention to deceive; there must be proof that artifice was used by one party, or with his knowledge, to induce the other to contract. An innocent misrepresentation in most cases will not be sufficient, tho in a contract of insurance, and sometimes as between persons who stand in a confidential relation, the innocent misrepresentation, if material, will render the contract null. Fraud generally includes misrepresentation. If there is present a dishonest intention on the part of the person who makes the misrepresentation, or recklessness equivalent to dishonesty, fraud will be easily found, because the mistake of the one party has been induced by the deliberate words or conduct of the other.

Fraud has been defined as a false misrepresentation of a material fact, made with knowledge of its falsity, or in reckless disregard of its truth or falsity, intending that it be acted upon by another who relies upon the statement, acts to his injury. The failure to disclose material facts, where there was a plain duty to disclose them, may amount to fraud.

The representation may be made by express words or by conduct. It may be a positive assertion, or merely a suggestion of what is false, and relate to a particular fact or a general state of things.

It is characteristic of a misrepresentation tainted with fraud or deceit, that it is made without positive belief in its truth; there may not be positive knowledge of its falsehood. Thus a person may, in ignorance of its truth or falsehood, make a material representation which proves to be false. In such case, his ignorance will be treated as equivalent to knowledge of falsehood. It was remarked in an English case that "if persons take upon themselves to make assertions on subjects of which they are ignorant, whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be true."

As to the effect of silence, it has been held that it is equivalent to misrepresentation, if the withholding of that which is not stated makes that which is stated absolutely false.

It was said by Lord Campbell that "a single word or nod or wink, or a shake of the head, or a smile from the purchaser, intending to induce the vendor to believe the existence of a non-existent fact, might be fraud." Thus if A has a picture which he considers valuable, and he thinks it is a Rembrandt, and takes it to a dealer who, knowing that it is a Rembrandt, laughs at A's suggestion, and indicates that he does not think it is a Rembrandt, and thus induces A to sell it to him for a trifling amount, A, if he finds out that the picture is actually a Rembrandt and that the dealer is disposing of it as such, can recover his picture.

A person who complains of fraud or misrepresentation must not only prove it, but also that it was false in fact; that the person who made it knew that it was false, or made it recklessly without knowing whether it was true or false; that he was induced by the misrepresentation to make the contract; and that within a reasonable time after he discovered the fraud, he repudiated the contract. He cannot act under the contract after he has knowledge of the fraud, and then demand to have the contract set aside.

14. *Undue influence.*—The consent of the parties to a contract must be given freely. If it is obtained otherwise, the contract may be set aside, if the person, whose consent has been forced, so desires. Such contract is voidable, not void; tho if a person were seized and his hands were forcibly guided to sign his name, say, to a promissory note, it is probable that this contract would be void, because there would be no consent.

To secure consent by undue influence would mean that another's weakness of mind, his necessities or distress, have been taken advantage of in order to induce his consent. It has been said in a case decided in the United States.<sup>1</sup>

Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections cannot be properly termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind, character, or by what art soever that human thought, ingenuity, art or cunning may employ which would give dominion over the will to such an extent as

<sup>1</sup> Schofield vs. Walker, 58 Mich., p. 96.

to destroy the free agency or constrain a person to do against his will what he is unable to refuse, is such an influence as the law condemns as undue.

What may be undue influence in a particular case it is difficult to say. In attempting to discover whether a person gave his consent freely and deliberately, the courts will take into consideration the age and capacity of the person, the nature of the transaction, and all the other circumstances of the case. It may be that the parties stand in such a relation that from habit the one dominates the other, or that under the circumstances one is in a position to use some undue influence. Thus it has been laid down in an English case, that "Where two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, altho the transaction could not have been impeached if no such confidential relation had existed." And, again, Lord Eldon lays it down that:

In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought into question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that

influence, the courts of equity cast upon the former the burden of proof that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced over-reached by him of more mature intellect.

*15. Duress; violence and fear.*—A person may give his consent to a contract, but that consent may be induced or extorted by fear. If actual violence is used, or violence is threatened, the party consenting under such influence may have his contract set aside. A distinction may be drawn between duress which involves actual compulsion, and menace which means the threat of actual compulsion. The term duress, however, covers both, as would also the terms violence and fear. If a man holds a pistol to another man's head and threatens to shoot unless that other sign some deed in his favor, the deed is signed as the lesser evil. Under some of the English decisions, especially the older ones, it has been held that to constitute duress or violence there must have been fear of loss of life or limb or of imprisonment; other cases, however, require that at least there shall be a reasonable and present fear of serious injury. Thus mere idle threats which are not intended nor understood in a serious sense will not ordinarily be sufficient.

The courts will consider the age, sex, character and constitution of the party who is threatened. Thus a threat made against a business man might have no effect, whereas it might induce an ignorant countryman to enter into a contract. The threat or violence

that might terrify a woman into signing might be held insufficient to bring a man to the same result.

Physical violence may be used, as for example where a girl was beaten by her father until she consented to marry a certain person. It may consist of threats of injury in the future—threats to do physical injury, or to injure the fortune or honor of the victim or even of a relative or friend. In France it has been held to be a case of violence, where the manager of a company which was in financial difficulties threatened several of the employes with dismissal unless they signed bills for it. Again, a young partner in a firm was informed by his co-partners that the books showed him to be \$9,000 short in his accounts; they threatened him with criminal proceedings and refused to let him see the books. Believing that what they said was true he paid them \$6,000. On examining the books it was found that he did not owe them anything, and the judge held that he was entitled to get his money back.

It is not violence if a creditor threatens his debtor with suit, but it would be violence if he threatened the debtor that unless he paid some sum in excess of the debt he would sue him. If A has stolen money from B, B can threaten to have him arrested unless he returns it. But if A admits that he has stolen \$50 from the bank which employs him, and the bank asserts that he has stolen much more, and induces his mother to sign a note for \$400, this is held to be a case of vio-

lence.<sup>1</sup> The person who alleges and proves duress, violence or fear may have his contract set aside.

### REVIEW

What does legality of object have to do with the making of a contract? On what grounds is legality of object based?

What is the legal status of wagering contracts? Is a contract of insurance enforceable? Is a contract for the sale and delivery of commodities at different prices enforceable?

What is meant by usury?

What is the general rule regarding contracts in restraint of trade?

What do you understand by unlawful combination?

What is the effect of illegality in a contract if some of the promises are legal; if any part of a single consideration for a promise is illegal? What part does intention play?

Discuss the differences between mistakes of fact and mistakes of law.

Define duress. What is the effect of duress, violence or fear on a contract?

<sup>1</sup> Macfarlane vs. Dervey, 1870, 15 L. C. J., p. 85 (Que.).

## CHAPTER VI

### OPERATION AND INTERPRETATION OF CONTRACTS

**1. Rights and liabilities of third parties.**—A contract is an agreement conferring rights and imposing liabilities upon the parties to it. It is their consent which has made the contract. A creditor can demand performance of the obligation from the debtor or his representatives. He cannot, as a rule, demand performance from a third person, nor can the debtor require him to do so. Yet the debtor or his representatives may perform the duty by an agent. Of course where an agent makes a contract for his principal and acts within the scope of his agency, the person with whom he contracts and to whom the fact of the agency has not been disclosed may, as a general rule, look to the agent or the principal for payment or performance. On the other hand, if the agent gave a promissory note or a check in payment, he would not be bound. The principal may not only be held liable on the contract made by his agent, but he may claim the benefits arising from it. In England it is well understood that a third person who maliciously interferes in the performance of a contract, as between the rightful parties to it, may render himself liable in damages: for example, if a third person maliciously induces an employe to break his engage-

ment with him employer, he may be liable in damages to the employer, and under the English cases this doctrine has been made applicable to contracts in general.

2. *Contracts made for the benefit of a third person.*—In England it is well established that a third person cannot sue on a contract made for his benefit by others, even if the contracting parties have agreed that he may.<sup>1</sup> In most of the American states the third party, in whose favor a direct benefit has been contracted for by others, may recover. In New York, however, the promise must be for the benefit of the third party, and there must also be such a relation between him and the promise that the promisor's obligation constitutes a satisfaction of some duty of the promisee to the third party.<sup>2</sup>

In an English case, which is an exception to the English rule, it was held that a provision in a partnership contract to the effect that a partner's widow should be entitled to his share of the business, might be enforced by the widow. But the court in rendering judgment pointed out that this provision in the contract created a trust for the partnership property in the hands of the surviving partner, and that if the widow acquired any right, as indeed she did, she acquired it because a trust had been created in her favor.

So it has been held in England that an agreement between A and B, that B shall pay a sum of money

<sup>1</sup> Pollock, p. 223.

<sup>2</sup> Gerstenberg & Hughes, p. 71.

to C (an agreement to which C is not a party, either directly or indirectly), will not prevent A and B from coming to an agreement to the contrary the next day. If the third person is to have any right, he must be a party to the contract.

In Quebec the law is stated as follows: a person cannot, by a contract in his own name, bind anyone but himself, his heirs and legal representatives; but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated. In like manner a party may stipulate for the benefit of a third person, when such is the condition of a contract, as the making of a gift to another; he who makes the stipulation cannot revoke it if the third person has signified his assent to it. Under the English law, while a stipulation may be made in favor of a third person, the latter cannot enforce it. Under the law of Quebec, however, it has been held that a third person, in whose favor a stipulation has been made, and who has signified his acceptance of it, may take action to enforce performance, altho he was not a party to the contract.<sup>1</sup>

In another case, heard in the Court of Appeals of Quebec, it was decided that a third party need not intervene in case a gift is made by one person to another, with stipulations in favor of the third party, and that mere acceptance by the person to whom the gift is made, confers on the third person the right to

<sup>1</sup> Brisebois vs. Campeau, 21 L. C. J., p. 16.

exact performance of the charge or benefit stipulated in his favor.<sup>1</sup>

It may be laid down as a general rule, however, that creditors may exercise the rights and actions of their debtor when, to their prejudice, he refuses or neglects to do so. Thus if a debtor refuses to recover from third persons, goods belonging to him which are in their possession, creditors may take action to recover them, in order that their rights may be protected and creditors may attack fraudulent contracts made by the debtor, as, for example, a transfer of personal property which hinders and delays them. Such an action will fail if the goods which are meant to be recovered in this way, are not really liable to answer the claims of the creditors. Thus, it was held that when a debtor gave certain creditors an agreement for an absolute sale of his property, as security, with the necessary result of surrendering and delaying his other creditors under circumstances which would support the preference, the judgment creditors were held to be entitled to such order and directions from the court as would enable them to reach all the property of the debtor that remained in the preferred creditors' hands after the preferred claims were paid.<sup>2</sup>

3. *Rules of evidence.*—When the parties to a contract put into writing what they have agreed upon, this document is the best evidence of what they in-

<sup>1</sup> Pare vs. Pare, 3 D. C. A., p. 359.

<sup>2</sup> Beliveau vs. Miller, 20 W. L. R., p. 96.

tended. The purpose in reducing the agreement to writing, and the actual effect of doing so, are to put into definite and permanent form what the parties intend, and to render impossible later disputes as to the terms of the agreement. Having put their agreement into writing, the parties must be held to have intended that it shall fully express their intention and to have excluded the possibility of altering it by any oral evidence. It may be stated, therefore, as a general rule, that oral evidence will not be admitted to contradict the terms of a valid written instrument. If A and B make a contract in writing, neither can show by oral evidence that he means something different from what is stated in the contract itself.

Oral testimony may be allowed in certain cases, however, as, for example, to explain abbreviations, ambiguous words or phrases; to identify the subject matter of the contract and the parties to it; to show surrounding circumstances, usage or custom, a condition precedent, fraud or illegality, delivery, a mistake of expression and a subsequent oral agreement. Thus witnesses have been allowed to prove that by local custom "a thousand" of rabbits was 1,200 (i.e., ten long hundreds of six score each); to define "year" in a theatrical contract to pay a weekly salary for three years, as meaning only the part of the year during which the theatre was open; to identify the wool described as "your wool," in a contract to buy wool. To admit evidence of this kind is not to contradict the writing, but to get something auxiliary to the writ-

ing—supplying, as was stated in an English case, “the mercantile dictionary in which you are to find the mercantile meaning of the words which are used.” This is necessary in order to assist the court in its endeavor to give effect to the intention of the parties.

4. *Rules of construction.*—When the courts are called upon to interpret a contract, they endeavor, as we have said, to discover the intention of the parties, and will proceed by means of certain rules of construction. When, for example, the terms of a contract are capable of more than one meaning, there is thrown upon the courts the task of construction, or of determining which meaning is to be preferred. The following are the general rules of construction:

(a) Words are to be given their plain and ordinary meaning, unless the context or surrounding circumstances show an intention to use them in a peculiar sense.

(b) In determining the intention of the parties, the agreement is to be construed as a whole; in other words, particular terms are to be construed in the sense which is most consistent with the general intention. The meaning must be collected from what is expressed in the contract, and not from a mere conjecture of some intention which the parties may have had in their minds and which they might have expressed had they been better advised.

(c) That construction should obtain which will best carry out the intention of the parties.

There are certain subsidiary rules, as, for example:

(d) In the case of a contention, as between printed and written words, the written will govern.

(e) Words are to be construed more strictly against the party using them.

(f) Where words or clauses are repugnant to one another, those which are in conflict with the manifest intention of the parties should be rejected as surplusage.

(g) Where a contract is ambiguous and one interpretation renders it valid and another invalid, the former will govern.

(h) Where one interpretation renders the contract reasonable and another unreasonable, the former will govern.

(i) Subsequent acts of the parties, not contrary to rules of law or the express terms of the contract, are entitled to strong consideration.

(j) Obvious errors of grammar are subject to correction.

(k) Words of general meaning are subject to restriction by words of a more specific character.

5. *Surrounding circumstances given consideration.*—The intention of the parties may be obscure. The court will then be entitled to look at the surrounding circumstances. There is a tendency in the more recent decisions, especially in England, to pay greater attention to all admissible indications of what the intention of the parties actually was, and to examine the conduct of the parties themselves as an in-

dication of their own construction and of the contract.

6. *Matters implied by law.*—Many contracts carry with them certain unexpressed obligations attached to them by law. Thus a man may sell another horse, and tho he does not warrant it sound, the law imports that warranty into the contract. On the other hand, he may sell the horse and stipulate that the sale is made without warranty. In mercantile contracts there is a presumption that time is an essential condition, where time is specified; but even where time is not specified, or is not so specified as to be of the essence of the contract, performance within a reasonable time can be required, and notice may be given that the contract will be rescinded unless performance is made.

If a person contracts to do a certain thing at or before a specified time, and fails to do so, the contract becomes voidable in whole or in part, as the case may be, at the option of the person in whose favor it is to be performed, provided that it was the intention of the parties that time should be of the essence of the contract. If time was not the essence of the contract, then the general rule is that the contract is not voidable by the failure to do it at or within the time specified; and the person in whose favor the contract is made may obtain damages for the loss he has incurred by the delay in performance.

7. *Liquidated damages.*—The parties to a contract may stipulate that a certain sum shall be paid for damages in case of breach of execution of the contract, in which case such sum and no other, either greater or

less, will be allowed to the creditor for such damages. This clause, at least under the French law, is frequently called a penal clause, or *clause pénale*. The Civil Code of Quebec has rejected the doctrine laid down by some of the older French writers to the effect that the amount payable under such a clause might be reduced by the court as being excessive where it was shown that it was larger than the damage actually suffered. Under the English law, penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced if the substantial performance of that which was really contemplated can otherwise be secured.

8. *Joint and several contracts.*—There may be one or more persons on each side of a contract. Their liabilities or rights may be joint or joint and several. For example, if there are three joint and several creditors of a debtor, each of them may singly exact performance of the whole obligation, and thereupon give a discharge in full to the debtor. If the creditors are merely joint, and not joint and several, then only one action can be brought against the debtor, and in this they all should join. There is a joint and several obligation on the part of co-debtors when they are all obliged to the same thing in such a manner that each of them singly may be compelled to the performance of the whole obligation, and that the performance by one discharges the others toward the creditor.

An obligation is not presumed to be joint and sev-

eral; it must be expressly declared as such. That is the general rule. A joint and several obligation may arise of right by virtue of some provision of law and in commercial transactions joint and several liability is the rule rather than the exception. In a partnership, for example, the partners are jointly and severally liable; and in some jurisdictions the obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

### REVIEW

What is the general rule concerning third parties and contracts?

May a third person sue on a contract made by others for his benefit? What is the general rule regarding the rights of a creditor when a debtor refuses to exercise his own rights?

What is the best evidence of intention? When is oral testimony allowed?

Give some rules of construction used by the court in interpreting a contract.

Discuss the liabilities or the rights of persons under joint and several contracts.

## CHAPTER VII

### ASSIGNMENT AND DISCHARGE OF CONTRACTS

**1. Definition of assignment.**—Persons other than a creditor may become entitled by representation or assignment to stand in the creditor's place, to exercise his rights under the contract; in other words, the creditor may transfer his rights against his debtor to some third person. An assignment, says another authority, is a transfer by one party to another of some right, title or interest in personal or real property. The instrument by which the transfer is made is also frequently called an assignment. The assignment must not increase the debtor's burden or diminish his remedies.

**2. Competent parties to an assignment.**—Persons who have capacity to contract may make an assignment. Where a partnership has a claim against some debtor, ordinarily one partner can assign this claim to some other person. A may assign his claim against B thru the ministry of his agent C. A tenant, where he is not forbidden by his contract or by law, may assign his interest in a lease. The person to whom the rights are assigned, under a contract may bring action in his own name; generally, notice in writing must be given to the debtor of the assignment, as he is entitled to

know to whom he can pay his debt. Thus if a debtor, before receiving notice of the assignment, were to pay his original creditor, he would be discharged. If the assignee sues him, he will be able to raise against the assignee any defence he might have raised against the original creditor. On the other hand, the debtor may consent to the assignment, in which case no notice will be necessary.

When there are several competing assignees, their claims will rank as between themselves, not according to the order in date of the assignment, but according to the dates at which they have respectively given notice to the debtor.<sup>1</sup> The debtor, on paying the first who gives notice to him, is discharged. In the case of negotiable instruments, these difficulties are overcome in that the absolute benefit of the contract is attached to the ownership of the document, which according to ordinary rules would be the only evidence of the contract. The instrument itself when it is transferable by indorsement is an authentic record of the successive transfers, and the bona fide possessor of the instrument is presumed to be the true owner thereof.

*3. Assignment of liabilities.*—In the assigning of liabilities the converse of the rule we have been considering is followed. Ordinarily speaking, a debtor may not assign his liability to be performed by some third person. It is a matter of public policy that the creditor should know to whom he may look for satisfaction after considering the character, credit and

<sup>1</sup> Dearle vs. Hall, Pollock, p. 232.

substance of the person with whom he contracted. Of course, if the creditor consents to accept another debtor a new contract is formed, and the old debtor will be released to the extent of the new contract.

Where a person has undertaken an obligation which is not purely personal and does not require the exercise of his own peculiar skill, he may have the contract performed by some other person, but he will remain liable for its due performance according to his contract. Again, there may be certain servitudes attaching to a piece of land, as, for example, the servitude by which low lying land must receive surplus water flowing from higher land; if the owner of the lower land assigns or sells it, the person to whom he assigns or sells must respect the servitude. If a party to a contract dies, his rights and liabilities pass to his heirs or representatives, and while they may take advantage of the rights, they must also carry the liabilities under the contract made by the deceased.

*4. Other examples of assignment.*—Bonds and mortgages are generally assignable, as also the benefits under judgments, insurance policies and contracts of suretyship. Chattel mortgages may also be assigned, in which case the transfer may cover the legal title to the property mortgaged and all the rights of the mortgagor under the mortgage, or only the equity or equitable interest of the assignor. But if a person has a right of action for breach of promise to marry, it is contrary to public policy that this right of action should be assigned to a third person. If A con-

tracts with a famous artist to paint his portrait, and the artist assigns the contract to another artist equally famous and able, A is not bound to accept the picture by the second artist, or to recognize him in any way.

5. *Modes of discharging a contract.*—There are several modes of discharging a contract, all of which we cannot discuss here. Among them, however, are the following: discharge by agreement, by payment or performance, by novation, by breach, by performance becoming impossible, by operation of law, by confusion, by compensation.

6. *Discharge by agreement.*—Naturally the parties who make a contract may in turn agree to cancel it. The contract itself may contain a stipulation for its cancellation under certain conditions. Thus, in an insurance policy it may be provided that if the risk insured is increased or changed, the policy shall be immediately void. The release of an obligation may be made either expressly or tacitly. The release would be considered to be tacit when the creditor voluntarily surrenders to the debtor the original title of the obligation, unless there is proof of a contrary intention.

7. *Discharge by payment or performance.*—By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of anything to which the parties are respectively obliged. If a contract is bilateral, that is, involves the doing of something by both parties, then the performance of obligation by one party discharges that person, but the contract is not wholly discharged,

because he is entitled to enforce performance by the other party thereto.

Whether the payment or performance is sufficient will depend upon the construction of the contract. Generally speaking, if the debtor has substantially performed his part of the contract, he may recover payment, but will be subject to a deduction for such damages as his omission or deviation from the contract may have caused the other party, tho this omission or deviation must be slight and not such as to deprive the other party of his rights. If the omission or deviation cannot be adequately compensated for in damages, the performance may be held incomplete.

A contract may provide that it must be performed to the satisfaction of the creditor, and the debtor will be strictly held to his obligation to meet the personal taste or judgment of the creditor, where this is intended. It has been held in some cases that under such circumstances performance will be sufficient if it satisfies the mind of a reasonable man. The obligation may be to deliver a thing determined in kind only; in this case, the debtor need not give a thing of the best quality, nor can he offer one of the worst: he must offer a thing of merchantable quality.

Unless the contract so stipulates, a debtor must perform or pay his obligation as a whole, and not in parts; and if a creditor has a right under his contract to receive a specific thing, he is not bound to accept another, tho it be of greater value than the thing due. If the obligation is to do a certain thing, the parties

to the contract may agree that money shall be paid in lieu of such performance, and the new contract discharges the old.

Generally speaking, where a negotiable instrument is given in payment of a debt which is due, under the English law the original obligation is only conditionally discharged, in which case if the instrument is not paid, the creditor may sue on the original contract, or on the instrument.

*8. Time and place of payment or performance.*—If the contract does not fix a date for performance, it is implied that the contract is to be performed within a reasonable time: but performance on a certain date may be of the essence of the contract. If so, the contract will be strictly construed. Performance later will not be binding on the other party, unless he waives the delay, as, for example, by agreeing to performance at a later date, or by accepting performance when it is made. In mercantile contracts the assumption is that time, when specified, is an essential condition, and when a person promises to do a thing "as soon as possible," he is bound to do it within a reasonable time.

Payment must be made in the place expressly or impliedly indicated by the contract. As a general rule, if no place is indicated and the thing to be paid or delivered is a certain specific thing, payment must be made at the place where the thing was at the time the contract was made. In all other cases, as, for example, where money is to be paid, the general rule

is that payment must be made at the domicile of the debtor. Thus, in a Manitoba case it was held that when a contract is silent as to the place of payment, and the debtor is a contractor who has done work in another province, the money will be payable at his residence.<sup>1</sup> In a Quebec case<sup>2</sup> it was held that the domicile which determines the place of payment is the debtor's actual domicile at the place of payment, and not some different domicile which he had at the time of the contract. The fact that the debtor may have paid certain instalments at the domicile of the creditor is not in itself of such a nature as to modify the law, or the rights of the parties in this respect. The court refused to hold that the defendant had, by virtue of any such payment at the domicile of the creditor, waived his right to pay the subsequent instalments at his own domicile.

*9. Composition with creditors.*—As we have already seen, a debtor may come to an arrangement with his creditors by which they accept less than the full amount of their claims on a compromise settlement. If such an agreement is made, the creditors have no claim for any balance. In the case of each creditor, the consideration for accepting less than is due to him is the fact that the other creditors also forbear to exact performance in full. If each forbears for part of his claim, each receives a benefit, because if one or more exacted full payment, some

<sup>1</sup> Empire Sash & Door Co. vs. McGreevy; Canadian Pacific Ry. Co., 22 W. L. R. 372.

<sup>2</sup> Coutu vs. Auclair, 18 Rev. de Juri, 435.

would be sure to lose thereby. In making such a composition with his creditors, however, a debtor cannot benefit one creditor over another, and an agreement to do so would be an agreement in fraud of his creditors and would be void.

*10. Application or imputation of payment.*—A debtor of several debts may, when paying, declare what debt he means to discharge, and his wishes in this respect must be observed. His intention may be discovered from his conduct, or from the circumstances under which he pays. If the debtor does not indicate what debt he means to discharge, the creditor may apply the payment toward any debt due to him by the person paying, provided the debt is not illegal. Having made his choice, he will be held to it, unless the debtor consents to another application of the payment. If the debtor has accepted a receipt by which the creditor has imputed the payment in discharge of a special debt, the debtor cannot afterward require the imputation to be made upon another debt, except upon the ordinary grounds for the avoidance of contracts.

If neither party makes a choice as to which of several debts shall be discharged by the payment, the payment will be imputed in discharge of the debt actually payable which the debtor has at the time the greatest interest in paying. This is the rule under the English law, as also in the Province of Quebec. Following this rule, it was held in a New York case<sup>1</sup>

<sup>1</sup> *Pattison vs. Hull*, 9 *Cow. N. Y.*, p. 747.

that the amount paid will be applied to a debt secured by a mortgage in preference to a debt which is not secured.

The Supreme Court of the United States has made decision, in a sense contrary to this rule, namely, that: "If the application is made by neither party, it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. It would seem reasonable that an equitable application should be made; and, it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In Quebec, also, it is laid down that, if only one of several debts is actually payable, the payment must be imputed in discharge of such debt, altho it be less burdensome than those which are not actually payable; if the debts are of like nature and equally burdensome, the imputation is made upon the oldest; all things being equal, it is made proportionately on each.

**11. *Tender.***—When a creditor refuses to receive payment, the debtor may make an actual tender of the money or other thing due. By making a tender, the debtor offers to carry out his bargain. When the tender is a sum of money and it is refused, it becomes equivalent to a payment on the date of the first tender, provided the tender was unconditional and was made at a reasonable time and place, and that since making

it the debtor has remained ready and willing to pay the money. If the debtor is sued, after making his tender, he should plead his former tender, renew it and deposit the money in court. The tender must be in money—a check or note would not be sufficient. The tender must be made by a person legally capable of paying to a creditor legally capable of receiving payment, or to some one having authority to receive payment for him. If the obligation of the debtor is to deliver goods, or to perform an obligation other than the payment of money, and the creditor refuses the tender made to him, the debtor is discharged. Moreover, if the creditor sues him for breach of his contract, he may plead his tender as a good defence.

The Civil Code of Quebec lays down certain rules for the tender of specific things.<sup>1</sup> Thus if a certain specific thing is deliverable on the spot where it is, the debtor must, by his tender, require the creditor to come and take it there. If the thing is not so deliverable and from its nature it is difficult of transportation, the debtor must indicate by his tender the place where it is, the day and hour when he is ready to deliver it, and the place where payment ought to be made. If the creditor fails, in the former case, to take the thing away, or in the latter, to signify his willingness to accept, the debtor may, if he thinks fit, remove the thing to any other place for safe keeping at the risk of the creditor. These rules are of general application also under the English law.

<sup>1</sup> C. C., Article 1165.

**12. *Novation.***—By novation is meant that a debtor contracts toward his creditor a new debt which is substituted for the old one, the latter being extinguished; or a new debtor is substituted for a former one, who has been discharged toward the creditor; or by the effect of a new contract, a new creditor is substituted for a former one, toward whom the debtor is discharged. In each case, the consideration is the creation of new rights and liabilities, and the extinction of old ones.

Novation can be effected only between persons capable of contracting. It will not be presumed. The intention to effect it must be evident. As Pollock puts it,<sup>1</sup> whether there has been novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct, unless there has been a distinct and unambiguous request. Thus, it has been held that the mere acceptance of a renewal note by a bank is only a conditional payment, and is not a novation of the original note, especially when the bank retains the original note. The bank may, at its option, proceed on the original note and tender the renewal note with its action, or it may proceed on the renewal note itself.<sup>2</sup>

It has also been held that when an agent, acting on behalf of a company, guarantees a contract made on behalf of the company, and gives his own promissory notes to accommodate a third person with whom

<sup>1</sup> Pollock, p. 216.

<sup>2</sup> The Bank of British North America vs. Harte *et al.*, 18 Rev. de Juri, 1834.

the contract is made, such giving of notes does not constitute novation; a new debt and a new debtor would be substituted for the previous debt and the previous debtor.<sup>1</sup> It has also been held that a settlement of indebtedness between a debtor and a creditor, by part payment and by notes of the latter, does not make "the intention to effect a novation evident," particularly when the creditor retains accepted drafts which he holds for the original debt. He has, therefore, the right to sue and recover on the latter.<sup>2</sup>

It has been held, however, that an agreement between an employer and an employe, in settlement of a claim for damages caused by an explosion, operates as a novation, whereby the delictual obligation is extinguished and a contractual obligation arises instead. If the latter be conditional, it only becomes executory upon the fulfilment of the condition.<sup>3</sup>

An unpaid vendor of movables, which are delivered to the purchaser on condition that the property shall not pass until the price, payable by instalments, is fully paid up, has the right to revindicate the movables, notwithstanding the acceptance by him of the notes of the purchaser, as no novation has thereby taken place.<sup>4</sup> It has also been held that the acceptance of a draft, for the amount of an overdue note, drawn upon the makers by the holder, and the fact

<sup>1</sup> French Gas Saving Co., Ltd., vs. Desbarats Advertising Agency, Ltd.,

<sup>1</sup> D. L. R. 136.

<sup>2</sup> Sabbath vs. Baker, 41 Que. S. C. 75.

<sup>3</sup> McKinstry vs. Irvine, 39 Que. S. C. 426.

<sup>4</sup> Tremblay vs. Quinn, 39 Que. S. C., p. 215.

that the latter afterward files a claim on the draft against the estate of one of the acceptors who had made an assignment, and receives dividends, does not effect a novation of the note. The indorsee could, therefore, recover from the maker the amount due on the note, less the sum received as a dividend.<sup>1</sup>

There is no substitution of agreements under the following circumstances. A purchases from B a case of shoes to be delivered in one week; at the end of the week A requests B to postpone the delivery of the shoes for a week longer, and B consents; at the end of the second week A refuses to accept the shoes, owing to the fact that the price has very materially decreased since he gave the order. A must accept the shoes and pay the price agreed upon.

A distinction must be drawn between a voluntary forbearance to deliver at the request of another, and a substitution of one agreement for another. If A requests postponement of performance, he must take the risk that in the meantime the price of the goods may change.

#### REVIEW

Who are competent parties to an assignment? Under what circumstances may a partner make an assignment?

Are the liabilities growing out of a contract assignable?

Give a number of ways in which a contract may be discharged,

Explain discharge by payment or performance. How important is the construction of the contract in this kind of discharge?

When no time is stated in the contract, what is the rule applied by the courts?

What is the result when the creditor refuses to accept the tender? How must the tender be made?

<sup>1</sup> Saint Arnaud vs. Guilbault, 39 Que. S. C. 481.

## CHAPTER VIII

### DISCHARGE OF CONTRACTS (*Continued*)

1. *Discharge by breach.*—The failure of one party to a contract to perform his part or undertaking is a breach of the contract, and gives rise to an action by the other party for damages that he may have sustained. The breach may also discharge the other party from the performance of his obligation. Whether the breach will have the effect of discharging the other party will depend upon the circumstances of the particular case. A creditor may in certain cases demand specific performance of the obligation, or he may be authorized to execute it at the debtor's expense, or the contract be set aside. There are exceptions to the rule, however. For example, the seller of a chattel cannot demand the dissolution of the sale because the buyer fails to pay the price, unless there is a special stipulation to that effect in the contract. But a party to a contract may be estopped from seeking a rescission of it for non-performance, when he has himself done something that makes it impossible to restore the debtor to his former position. It has been held in Quebec that performance after action brought to rescind a contract is not a valid ground of defence, and that no notice of failure to perform the undertakings of a contract is re-

quired as a condition precedent to an action to rescind the contract for non-performance.

Under the following circumstances there will be a breach of contract and the contract be discharged:

1. Where one of the parties does not perform his obligation or promise;

2. Where one of the parties renounces his liabilities under the contract;

3. Where one of the parties does something which renders performance of the contract impossible.

2. *Breach thru failure of performance.*—When one party to a contract has failed in performance, as we have already said, the injured party may or may not be discharged from the performance of his part of the contract. He may merely have a right of action for damages. The distinction depends upon whether the contract is divisible or indivisible, or whether the promises in the contract are independent of one another or mutually dependent. Thus, if a contract is divisible and the promises are independent of one another, as, for example, if the contract as a whole is made up of a series of contracts, a breach of one of them need not discharge the others: but if the contract cannot be broken up into parts, and the promises contained in it depend upon one another, so that if one is broken all are broken, a breach of performance by one party will discharge the other, and also give that other an action in damages, if he has suffered damages.

The courts differ in their interpretation as to whether given contracts are divisible or indivisible.

The Supreme Court of the United States has held that if A contracts to sell to B 600 bushels of corn in three monthly instalments of 200 bushels each, the contract is indivisible, and that if A fails to deliver one instalment, the whole contract is discharged. In England, the contrary is held to be law. The Supreme Court of Canada has held that an agreement between the parties to several transactions involving litigation, to do a series of acts in settlement of their differences, is divisible, and a performance of part of them will be held binding and effective, notwithstanding the failure to perform the whole, more particularly as against the party thru whom such failure appears.

A person sold a restaurant to another, and part of the price was to be paid at the time of the contract, part when the license should be transferred, and the balance in monthly payments; the vendor turned over the restaurant to the purchaser, but later re-took possession. The purchaser, on the other hand, made no attempt to get the license transferred, and the vendor did not offer to assist him. Later, the purchaser asked that the contract of sale be set aside and that he be reimbursed what he had paid, alleging that he had dispossessed himself. It was held that, as both parties had failed to execute their promises and apparently did not wish to carry out the contract entered into between them, there was no need to pronounce it dissolved.

**3. *Independent promises.***—It may be difficult to decide whether or not the promises are independent of

one another. It will be sought to discover what was the intention of the parties, and that intention may be disclosed by the order in which the several promises are to be performed. It was held in an English case that "whether covenants are or are not independent of each other must depend on the good sense of the case, and the order in which the several things are to be done." Suppose that several different articles are bought at different prices and at the same time. If it could be shown that the purchaser intended to take all or none, then the contract would fail if all the articles could not be delivered. If it could be shown, however, that this was not the intention, then the contract would be severable as to each article.

4. *Conditional promises.*—A contract is said to be conditional when it is made to depend upon some event, future and uncertain, by suspending it until the event happens, or by dissolving it according as the event does or does not happen. Generally speaking, if the contract depends upon some event which, unknown to the parties, has actually happened when the contract is made, the contract is not conditional, but takes effect or is defeated from the time when it is made.

The condition must not be contrary to law, or inconsistent with good morals, and the contract is void if it is made to depend upon the doing or happening of something which is impossible. Thus if A contracts, promising to pay B \$100 if C shall climb to the moon, the condition is an impossibility and the promise void. An obligation must not be conditioned

merely on the will of the party promising. Thus a promise by A to go to Toronto on a certain day if he feels in the mood to do so, is conditional purely on the will of A; tho A may validly promise to pay B \$100 if he should go to Toronto on a certain day. If no time is fixed for the fulfilment of the condition, it may be carried out at any time.

The condition will not be deemed to have failed until it becomes certain that it will not be fulfilled. The condition may be merely suspensory or floating in its nature, and non-performance will not discharge the promisor. The actual carrying out of the promise is merely suspended. Thus in a fire insurance policy the liability of the insurer is conjectural, and fulfilment of the insurer's promises is suspended until the event insured against takes place. But if A contracts that he will buy a horse from C if B will buy one from C, then A's promise is conditional upon B's promise, and if B does not perform his contract, A need not perform his. These are examples of the condition precedent. An action in damages may lie for breach of a condition precedent, which is vital in its nature and not merely suspensory. The injured party may also as a result be discharged from his promise.

If the parties to a contract agree conditionally that they each must do something simultaneously (concurrent conditions), then in order that one shall have an action in damages for non-performance, against the other, he must have been ready and willing, at the time fixed for performance, to do what he had undertaken.

If either party is not ready and willing at that time, the other is discharged.

If a company employs an agent under a contract by which it can dismiss him by giving him one week's notice, the condition is fulfilled by the giving of the notice, and the contract is thereby definitely terminated. This is a condition subsequent.

It is a well-recognized principle of law that a contract for personal services which can be performed only during the lifetime of the party contracting is subject to the implied condition that he shall be alive to perform them; if he dies, his executor is not liable to an action for breach of contract occasioned by his death.<sup>1</sup> If an employer dies, his servant is discharged and cannot treat the contract as in force against the master's personal representatives.<sup>2</sup> Thus it has been laid down that "a contract by an author to write a book or by a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the author became insane or the painter paralytic, and so rendered incapable by an act of God, of performing the contract, he would not be personally liable in damages, any more than his executors would be if he had been prevented by death." In an English case, the father of a boy entered into a contract with a firm that his son should serve as an apprentice for a number of years. The boy fell ill and the employer sued the father for breach of the con-

<sup>1</sup> Jackson vs. Union Marine Insurance Co. 1874, 44 L. J. C. P. 27.

<sup>2</sup> Farrow vs. Wilson, 1869, 38 L. J. C. P. p. 36.

tract. It was held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance," and the action was dismissed.

5. *Breach of a subsidiary promise.*—If some subsidiary promise in a contract is broken, the contract may not be discharged, but an action for damages may arise. The parties may consider that the subsidiary promise is of such importance that its literal fulfilment is a condition precedent, and if this is so it will be treated as a condition precedent. If, on the other hand, it is clear from the surrounding circumstances that some subsidiary promise, tho apparently of first importance and on its face a condition precedent, is not really vital, and that its non-fulfilment might be adequately compensated for in damages, then, if such an intention or understanding is sufficiently expressed, such a condition will not be treated as a condition precedent.

There is a distinction to be made between a warranty which gives rise to an action in damages, and a condition the fulfilment or non-fulfilment of which is of the essence of the contract, in that it strikes at the foundation of the contract. Thus if A sells a horse to B, and he believes it to be sound and warrants that it has not the heaves, and B could discover by having the horse examined by a veterinary surgeon whether it has or has not the heaves, in some jurisdictions B would have an action in damages against A, if after

the sale the horse proved to have this weakness. If, however, A sold a horse to B on the condition that it should, with training and within three months, develop a certain speed as a racehorse, this would be a condition precedent, upon the non-fulfilment of which B could ask to have his contract canceled, and demand the return of the price upon his handing back the horse.

6. *Breach by renunciation.*—Either before or at the time that a contract is to be performed, a party may declare that he repudiates or renounces the contract and will not perform his part of it. If he so renounces before the time of performance, the contract may or may not be discharged, accordingly as the other party does or does not treat it as discharged. The other party may treat the contract as discharged and take action at once for any damages, or he may wait until after the time for performance, in which case he is entitled meanwhile to insist that the relation created by the contract shall persist up to the time fixed for performance. In an English case, it was held that "the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for the performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract; its unimpaired and unimpeached efficacy may be essential to his interests."

The mere intention of one of the parties to renounce is not sufficient. The renunciation must be express,

positive and unqualified. The contract may be in the course of performance, and then it being renounced, the other party may immediately take action for damages. Thus it was held in an English case, that "when there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor being desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract." It has been held in a Quebec case that, where a person contracts for the manufacture of machinery, and afterwards notifies the manufacturer that he will not accept delivery of it unless certain guarantees respecting it, not mentioned in the contract, be given to him, he is thereby held to repudiate the contract and he becomes liable for the price of the machinery, less whatever value it may have for the manufacturer.<sup>1</sup> So also if a person contracts to give his services to a company, and his personal services are the foundation of the contract, his refusal to give his services entitles the other party to rescind the agreement.

If the parties to a contract abandon it by mutual

<sup>1</sup> Morgan-Smith *et al.* vs. Montreal Light, Heat & Power Co. 30, Que. S. C. 242.

consent after it has been partly performed by one party, the latter is entitled to receive a reasonable price for the work he has done. If, however, a board of school commissioners employs a teacher for eight months, and before the school opens informs him that his services will not be required, the teacher may treat the contract as discharged and sue the board for damages; or he may wait until the expiry of the eight months and sue on the contract for his salary. Of course, meanwhile he must not refuse other work, and what he may earn in the meantime under another contract will go toward reducing the amount that he may claim under his original contract.

A enters into a contract with B for the purchase of B's farm. Payment is to be made in several instalments, and upon payment of the last one B is to deliver to A the deed of the farm. A refuses to pay the second instalment when due, and B sues him for it. B may recover. A's promise to pay each instalment, other than the last one, is independent of the covenant to convey; hence B may sue him for each instalment other than the last without offering to convey the farm. But in order that one party may demand the rescission of a contract which is in the course of being performed, the other party must be actually in default to fulfil his contract. It is not sufficient for the other party to allege merely that under the circumstances it is impossible for the party performing to fulfil or complete his contract within the delay specified.

## REVIEW

What is a breach of contract?

When does failure of performance discharge the contract?

How does the distinction between divisible and indivisible contracts affect discharge by failure of performance?

When is a contract conditional? What restrictions are put on the conditions of a contract? What is a condition precedent?

Of what effect is the breach of a subsidiary promise?

What is meant by breach of renunciation? Must the renunciation be express?

## CHAPTER IX

### DISCHARGE OF CONTRACTS (*Continued*)

1. *Discharge by impossibility of performance.*—A contract may be void or become discharged under certain circumstances, when performance is impossible at the time the contract is made, or becomes impossible afterward. Whether a contract is discharged because of impossibility of performance or otherwise will depend upon the circumstances surrounding the particular contract. Because of impossibility of performance, the contract may never exist, or it may be discharged. If the impossibility of performance exists when the supposed contract is made, the contract is not discharged, as it is void to begin with, it is not formed. The doing of some impossible thing is not a proper consideration. The thing which is contracted to be done may in itself be impossible, as, for example, if a man made a contract to run a river up-hill, or to do some other impossible thing. We have said that the contract may be impossible of performance when it is made. Thus if a person contracts to dig 1,000 tons of a certain kind of clay on a certain property where there is no such clay, or if the subject matter of the contract is no longer in existence when the contract is made, the contract is void. So if A

sells a horse to B, and unknown to A the horse is dead, there is no contract.

After the contract is made performance may become impossible, and the contract may or may not be discharged, according to circumstances. It may become impossible by law as being inconsistent with some legal principle, or by reason of the existence of a particular state of things which renders performance impossible. The courts will examine the intention of the parties to discover whether they really intended that, should performance accidentally become impossible, the contract should be altogether discharged; for it must be taken into consideration that so far as possible a valid contract will be maintained, and that under certain conditions a person will be bound to fulfil the duty he has undertaken, altho some accident may intervene, against which he might have provided by his contract.

*2. Destruction of the subject matter.*—Performance of the contract may depend on the existence of some specific thing. If performance becomes impossible by reason of its destruction, the contract will, as a rule, be discharged, unless there is some warranty express or implied, that the subject matter shall continue to exist. In a leading English case,<sup>1</sup> the defendants agreed to let the plaintiffs have the use of a music hall on certain days for the purpose of giving entertainments. Before the hall was used for this purpose, however, it was destroyed by fire,

<sup>1</sup> Taylor vs. Caldwell, 3 B. & S. 826.

neither party being in fault. It was held that the defendants were excused, and the general principle was laid down that "where, from the nature of the contract, it appears that the parties must have known from the beginning that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor."

The rule of the English law is that where the property in a specified thing which is to be delivered at a future date has passed by bargain and sale, and the thing is destroyed before delivery without the fault of the vendor, he is excused from performing his contract to deliver. The Civil Code of Quebec lays down that, when the certain specific thing which is the object of an obligation perishes, or the delivery of it from any other cause is impossible, without any act or fault of the debtor and before he is in default, the obligation is extinguished. It is also extinguished, altho the debtor be in default, if the thing would equally have perished in the possession of the

creditor; unless in either of the above mentioned cases the debtor has expressly bound himself for fortuitous events. The rules are therefore similar.

Thus in an English case, where A agreed with M to erect an engine and other machinery on M's premises, at certain prices for the separate parts of the work, and no time was fixed for payment, but while the work was being done and before completion of any part the premises and the uncompleted work and materials were accidentally destroyed by fire, without fault of either party, it was held that there was no promise or warranty by M that the premises should at all times continue fit to receive the machinery; that the burning of the building was a misfortune equally affecting both parties, excusing both from further performance of the contract, but not giving a cause of action to either.

It has also been held in England that a contractor for work, to be paid for in a lump sum, can recover for part only if he has been prevented from completing the work thru the other party's default, or if there is a new contract to pay for what has been done. Pollock remarks that in the United States, however, recovery for the work is generally allowed. But if A agrees to make certain goods in a particular factory for B and before they are made the factory is accidentally destroyed by fire, the contract is discharged on the principle that it was the intention of the parties that the contract should depend upon the continued existence of the particular factory.

In the same way, if A sells B a crop of rye to be grown on a particular piece of land, and the crop is destroyed by a hail-storm before it matures, the contract is discharged, because the subject matter is destroyed.

The rule arising out of the case of *Taylor vs. Caldwell* has in England been extended to cover cases where, altho some material object is not destroyed, a state of things which the parties had in mind as essential for performance, ceases to exist.

A number of cases arose out of the fact that various contracts were made in preparation for the coronation of King Edward VII, the arrangements having to be cancelled owing to the postponement of the coronation. The general principle laid down by the Court of Appeals to govern these cases was, that the contract was not voided when the failure of the condition assumed as its foundation was ascertained, but all outstanding obligations under it, and those only, were discharged; that is, payment already made could not be recovered back, and any payment which was actually accrued could be recovered.<sup>1</sup>

**3. Legal impossibility.**—The obligation of a person under a contract is discharged if performance is rendered impossible by law. The performance may be forbidden, or be impossible by a judgment of the court, or by the passing of some statute, or otherwise. In an English case, a lessor covenanted with a lessee that neither he (the lessor) nor his assignee would

<sup>1</sup> *Pollock*, 440. *Bailey vs. DeCrespigny*.

allow any building on an adjoining piece of land. Later, acting under an Act of Parliament, a railway company bought the land and built a station upon it, while the lease was still in force. An action against the lessor by the lessee was dismissed, as it was held by the court that the lessor could not perform his covenant. The principle of the decision was that by the Act of Parliament the lessor had really been compelled to part with his land to the railway company; that under the circumstances he was unable to impose restrictions upon the company, and that the company was not an assign direct from him, but a new kind of assign, such as was not contemplated by the parties when the contract was made. Pollock points out, in commenting upon this decision, that if the lessor had secured the passing of a private act upon his own initiative, he would probably have been bound by his contract toward the lessee.

It has been held in an interesting American case, that if an employe contracts to work for a definite period, and to give two weeks' notice of his intention to leave, or in lieu thereof to forfeit two weeks' wages, and he is imprisoned for some crime which he commits, the giving of the notice becomes impossible, and he is entitled to his wages.

**4. *Incapacity for personal services.***—A contract for personal services may depend for performance upon the life or continued health of the person who promises them. Contracts for personal services, therefore, which can be performed only during the

lifetime of the person who promises them are subject to an implied condition that performance will be possible and will be made only if he lives or retains his health. If he dies, his executors or personal representatives cannot be sued for breach of the contract, because the contract has been discharged. Of course the contract may have provided just the contrary, and it may have been stipulated that upon his death or incapacity certain other persons, among whom might be his executors or legal representatives, should be bound to performance.

This point arose in an English case,<sup>1</sup> where it was held, (a person having been under contract to give a pianoforte recital, and being disabled by illness): “This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of the opinion that by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and, as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute.”

On the same principle a servant is discharged by

<sup>1</sup> Robinson vs. Davison, L. R. 6 Ex. 269.

the death of his master, and cannot bring action to enforce the contract against the master's personal representatives. In the case of Robinson vs. Davidson, to which we have referred, the defendant's wife was a well-known piano player. She made a contract to play at a certain concert. Just before the concert was to take place she fell ill and was unable to appear. The person who had employed her sued for the loss he had suffered by having to put off the concert, and judgment was rendered in his favor for a small amount, on the ground that the illness discharged the contract, she had not given notice of her inability to play within a reasonable time. The amount awarded was intended to cover the expenses of the plaintiff in giving notice of postponement to the public and to subscribers, in excess of what it might have cost him had she notified him by telegraph, instead of by the longer method of writing a letter. It was laid down in the same case that the contract became void by her inability to play, and was not merely voided at her option. She could not have insisted on performing her engagement when she was really not in a condition to do so properly. On the other hand, if the performer had suffered some accident immediately prior to the hour of engagement, say while on her way or during the day, notice would hardly be of any use, and there would probably be no damages which could be assessed against her for lack of notice. Contracts which are not so personal that they cannot be performed by a deputy or an

agent, will not be discharged for such a cause, unless the parties have agreed that such shall be the case.

5. *Liability upon refusing to work under dangerous conditions.*—There is a good deal of authority for the view that a person who has contracted to do a certain thing will be discharged from his contract if the performance would bring him into positive danger, and that under such circumstances he will not be liable for a breach of his contract if he refuses to perform it. If, however, an employer stops work temporarily, as, for example, in the presence of an epidemic of scarlet fever, it has been held that he will be held liable for the wages of his employes during such time.

Thus if some employes in a mill quit work because they fear infection owing to an epidemic of disease, it has been held that they may recover the value of the work they have done, and as they were justified, under the circumstances, in refusing to court danger, they will not be liable for damages for having broken their contract. In a case decided in Maine<sup>1</sup> it was laid down: "The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were

<sup>1</sup> Lakeman vs. Pollard, 43 Me. 463.

healthy, and continued to be so. He could not *then* have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must necessarily have acted at his peril under the exercise of his judgment."

An epidemic broke out in a school district and the school authorities closed the school. A teacher was held entitled in a Michigan case to recover his salary, and the decision laid down that "the plaintiff continued ready to perform, but the district refused to open its house and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff had to bear it."<sup>1</sup>

6. *Performance impossible by the fault of either party.*—The person promising, the promisor, may by his own act make it impossible to perform his contract. If so, he is not discharged, and, as he has committed a breach of his contract, he will be liable in damages. If, however, by the fault or act of the promisee, the promisor is prevented from performing his contract or some part of it, the promisor is

<sup>1</sup> *Dewey vs. Alpena School District*, 43 Mich. 480.

discharged to that extent. The promisor may in such case sue for damages; he may also bring action to rescind the contract and to recover what he may have paid. Thus if a contractor undertakes to put up a building and have it completed by a certain date, and it is stipulated that for every day beyond that date that he is still engaged on the work he will pay a penalty of \$25, he will not be liable to the penalty or for damages if the delay has been caused by the default or act of the other party.

It has also been held in an English case<sup>1</sup> that if a person orders a machine designed to do certain work, and the contract provides that the machine is to be accepted only if it prove satisfactory after test, the buyer will be found to accept and pay for the machine if he does not provide a fit occasion to make the test, or if he deals with the machine in such a way as to prevent a fair test being made, according to the spirit of the contract. So also if A makes a contract to buy 1,000 barrels from a manufacturer who agrees to manufacture them. The manufacturer makes and delivers 500, when he receives a notice from A not to make any more, as he does not need them and will not take them. It has been held that A will be liable in damages to the manufacturer for the breach of his contract.

*7. Discharge by operation of law.*—Under certain conditions, by operation of law, a contract will be discharged, as, for example, where a contract under

<sup>1</sup> *Mackay vs. Dick*, 1881, H. L. (S. C. 6 A. C. 251).

private signature is replaced by a contract in notarial form, provided the latter is not intended as a mere collateral contract or security. The first is said to be merged in the latter and extinguished. If A and B enter into a contract, and B, because of A's default, sues him and secures a judgment against him, the judgment replaces the contract—the contract is merged in the judgment. No further action can be taken upon the contract itself, tho proceedings may be continued upon the judgment. Where a written contract is made embodying the terms of an oral contract, the latter is not merged in the former. The written contract, provided it is not under seal or in solemn form, is a contract of no higher nature than the oral contract, but the written contract is better evidence of what the parties intended, and is given priority over the other.

A contract may be discharged when some material alteration or change has been made in it. If it can be shown that the alteration was made before the document was signed, the parties will be held bound. It may be made after the contract is signed, and the parties will be bound by it, if it can be shown that they consented to the change. If, however, after the contract is made and signed, one of the parties intentionally makes some change in it by an erasure or otherwise, or gets a third person to make it for him, without the knowledge and consent of the other party, then the general rule is that the contract is discharged, and the person who has not given his consent will not

longer be bound. Occasionally a third person, without the consent of either party, may make some alteration in a written document, and under the later decisions, if the terms of the original contract can be established, the contract will not be discharged. Generally speaking, in order that the contract may be discharged, the alteration must be material, in which case it will not be any question of prejudice.

What may be a material alteration must be decided in each case. As we shall see later when discussing negotiable instruments, when a bill, note or other negotiable instrument is materially altered without the consent of all parties liable on it, the instrument is voided, except as against a party who has himself authorized or assented to the alteration. If, however, a negotiable instrument has been so altered that the alteration is not apparent, a person who in good faith gives value for it before maturity, and without notice of the alteration, may enforce payment of it. A material alteration is one which alters the operation of the instrument or the liability of the parties, whether the alteration be prejudicial or beneficial. Thus, a defendant indorsed a note for the accommodation of the makers; afterwards they inserted the words "with interest at 10 per cent," without his knowledge. He was not liable for value on the note to a bona fide holder. In an Ontario case, it was held that a note is discharged by the insertion of the words "jointly and severally," even tho the holder erased the words before the objectors became aware of the change. In an-

other case decided in England, a draft was materially altered by the son of the person who accepted it. The next day the acceptor gave her son full authority to draw, accept and indorse for her. It was held that the bill was voided by the alteration.

If the alteration was made by accident or mistake, the instrument is not necessarily voided, in which case, of course, the burden of proof will be on the person who alleges that the alteration was not intentional. It has been laid down, however, that if the alteration is intentional, but is made under a mistaken idea of the rights of the person making the alteration, the instrument is void. Thus it has been held that if a banker cancels a bill by mistake, without any want of due care, he does not incur any liability; but if there is negligence, he will be held liable for any loss which results therefrom. The mere fact that a written contract is lost does not discharge it, because, upon the loss being proved, oral evidence may be made of the terms of the contract. Thus it has been held that where a will is lost, oral evidence may be given that a will was made, and also a statement of its provisions.

8. *Insolvency; proceedings in bankruptcy.*—A debtor may become insolvent, and his assets may be realized and used to pay his debts, in whole or in part. If there is not sufficient to pay his creditors in full, he is not discharged because of insolvency. Under the Confederation Act, Section 91, the subjects of bankruptcy and insolvency are within the exclusive legis-

islative jurisdiction of the Dominion Parliament, and there is no Dominion bankruptcy law. In the United States, however, where there is a bankruptcy law, a debtor who makes a general assignment under the National Act for the benefit of his creditors is discharged from further liability for his existing debts. If he turns over all his property for the benefit of his creditors, he can begin business again without fear of being called upon to pay old debts. This is not the case in Canada.

9. *By confusion.*—When the qualities of creditor and debtor are united in the same person, there arises a confusion, which extinguishes the obligation.<sup>1</sup> Thus if A owes B \$1,000, and B dies and A is his universal heir, or B has by will left him all that he has, A's obligation is discharged. Or if B had been indebted to A, and A was B's universal heir, the debt would be extinguished.

10. *By compensation.*—When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation. Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have for object a sum of money or a certain quantity of indeterminate things of the same kind and quantity. But compensation does not take place to the prejudice of rights acquired by third parties.<sup>2</sup>

11. *Remedies for breach of contract.*—It would be

<sup>1</sup> Quebec Civil Code, Art. 1198.

<sup>2</sup> Quebec Civil Code, Arts. 1188, 1189 and 1196.

unfair that where a contract is violated by the act of one of the parties thereto, the other party should suffer loss. The innocent party is therefore relieved from performance, and if he has suffered loss he may bring an action to recover the amount thereof. If the innocent party has in part performed his side of the bargain, he may treat the contract as cancelled, and sue for a reasonable compensation for the part he has performed, as also for damages, if he has suffered any. In some cases, as we have seen, specific performance of the contract in full may be demanded.

**12. *Damages recoverable for breach of contract.***—Where a breach of the contract cannot be justified, the innocent party is entitled to recover such damages as he has suffered. He may not have suffered any damages, but in many cases he will be allowed a nominal amount. If his loss can be assessed in money, he is entitled, as was said in an English case, to be placed, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed. The damages must, however, be approximate, and they must be capable of being proved with reasonable certainty. Thus if a Jewish merchant in Toronto ordered a barrel of special Passover rum from a merchant in New York, to be delivered in Toronto, and the consignment was delayed in transit, as, for example, by heavy storms, but under such conditions that had the carrier been informed that if the rum was not in Toronto within a reasonable time before the Passover season it would be use-

less, it would have made special efforts to forward the rum in preference to other consignments not required for a special date, the Toronto merchant could not recover more than a reasonable amount for damages. He would not, under such conditions, be entitled to recover speculative damages, namely, the amount which, in excess of ordinary prices, he might have obtained for the rum because of its special character. It was laid down in an English case that:

Where a party has broken his contract, the damages which the other party could recover should be (1) such as may fairly and reasonably be considered to arise naturally, that is, according to the usual course of things, from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach; that (2) if the damages arose out of special circumstances, communicated and so known to both parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances so known and communicated; but (3) if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great majority of cases not be affected by any such special circumstances.

This reasoning applies fully to the case of the Jewish merchant, and is sound law and sense.

#### REVIEW

What is the effect of impossibility of performance and when may it occur? When does it discharge the contract?

What is the effect of the destruction of the subject matter?

On what does a contract for personal service depend? Give an example.

When is a person justified in refusing to carry out a contract under conditions of danger?

What is the effect on a contract when the promisor prevents performance? When the promisor is prevented from performing?

Give some methods of discharging a contract by operation of law.

When one party commits a breach of contract, what are the remedies of the other party to it?

## PART II: SPECIAL FORMS OF CONTRACT

### CHAPTER X

#### SALES: THE CONTRACT

1. *Definition.*—A sale is a contract by which one party gives a thing to the other for a price in money, which the latter puts himself under obligation to pay. Benjamin defines sale as a transfer of the absolute or general property in a thing for a price in money.

That there may be a valid sale there must be:

- (a) Parties competent to contract.
- (b) Mutual assent.
- (c) A thing, the absolute or general property in which is transferred from the seller to the buyer.
- (d) A price in money paid or promised.

The difference between the absolute and general property in the thing sold may be explained in a few words. In the theory of the law, there may be in a sense two owners of a thing, one of whom has the general and the other a special property in it. The transfer of the special property is not a sale of the thing.<sup>1</sup> Thus a factor in New Orleans bought a cargo of corn, with his own money, on the order of a

<sup>1</sup> Benjamin, "Sale," 5th Ed., p. 2.

London correspondent. He shipped the goods for account of his correspondent, wrote letters of advice to that effect, sent invoices to the correspondent, and drew bills of exchange on him for the price; but he took bills of lading to his own order, and indorsed and delivered them to a banker, to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.<sup>1</sup> Benjamin gives as a further illustration the case where goods are delivered in pawn or pledge; the general property remains in the possession of the pawnor (which he may transfer to a third person, subject to the rights of the pawnee), and a special property is transferred to the pawnee.

**2. *Distinguishing features.***—A sale must be distinguished from a contract or promise to sell. If A sells a certain horse outright to B, of course there is a binding contract of sale; but if A merely promises to sell a certain horse to B, no sale has taken place, and the title to the horse is not vested in B—the title remains in A. B's right is to demand that the sale be made absolute. Hence an agreement to sell becomes a sale, when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred. The price must be in money, which is either paid or promised. If goods be

<sup>1</sup> *Jenkyns vs. Brown*, 14 Q. B. 496.

merely exchanged between the parties, there is no sale, but a barter. If a man does a piece of work and he receives in consideration thereof certain goods, there has been a transfer of the general and absolute property in the goods, but no sale has taken place. So also if a person transfers certain goods or things to another, and receives no consideration in return, there has been a gift and not a sale. There may be a transfer of the possession of property, but not of the ownership, in which case there is a bailment.

3. *Parties to a contract of sale.*—The general rule is that the parties to a sale must be competent to contract, and to transfer and acquire property. Only the owner of the thing or his authorized representative can give a title, and thus transfer the ownership; otherwise the buyer gets no better title than the seller. Thus if A buys a watch from B which B has stolen or found, A may pay the full value and be in good faith, but he cannot claim that he is the owner as against the true owner who seeks to recover; nor could A make a valid sale of the watch to some other person.

The rule apparently does not apply to money which is stolen. If it is paid over by the thief to other parties who have given value in good faith, they cannot be compelled to repay it; nor would the rule apply to negotiable instruments which are payable to bearer or indorsed in blank, if the person who has signed them has been guilty of negligence which has rendered the wrongful appropriation more easy. But where a

blank acceptance was stolen from the desk of the signer and filled up, it was held that he was not liable to a holder in due course, that is, to a person who took the bill for value before maturity, and without any knowledge of the facts. The signer was not guilty of negligence, and had not intended that his signature should be used without his knowledge and without delivery of the instrument by him.

A person may make a valid agreement to sell a thing which is not his at the moment, and which may not even be in existence. Thus a person may sell the crop of wheat which he expects his farm will produce during the next season, or he may contract to sell 1,000 head of cattle, which he must first go out and buy.

But a person who finds or steals the goods of another does not get a good title. The general rule is that the person to whom he transfers the goods, even tho this person is an innocent purchaser for full value, does not get a good title. The English rule is that where goods are sold in market overt (that is, an open, public and legally constituted market), according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

In Quebec, the rule is that if a thing lost or stolen is bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing

to the purchaser the price he has paid for it. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.<sup>1</sup> Apparently the English rule of market overt does not prevail in the United States. Hence, in the United States, if B buys a horse in a public market from one who is not its owner and who has no authority, either actual or apparent, from the owner to sell it, the buyer gets no title which he can oppose to the owner. B has redress only against the seller.

4. *Subject matter of the sale.*—Everything may be sold which is not excluded by its nature or destination, or by special provision of law from being an object of commerce. A general rule may be stated to the effect that a present or actual sale can be made only of things which actually exist at the time and are owned by the seller. This is now the rule in England, tho it was not always so. The English rule would probably be followed in the English law provinces. Following that rule, then, one does not *sell* future goods, but makes an *agreement to sell* them—tho the contract may be called a sale.

In the United States and in Quebec, on the other hand, one may make a present sale of future goods which have a potential existence—and this rule was formerly recognized in England. Future goods having a potential existence are, for example the natural produce or the expected increase of something already owned or possessed by the seller. Thus the hay

<sup>1</sup> Quebec Civil Code, Arts. 1489-1490.

that will grow next season in the seller's field, the wool that may be clipped from his sheep, the milk that his cows may yield, and so on. Of these he may make an immediate grant or assignment by sale. The buyer's title and right to possession are perfect as soon as the thing comes into actual existence. Future goods, such as the hay, or wool, or milk which he may derive from the field, or sheep, or cows are goods of which he cannot make an immediate assignment by sale, but which he can promise or agree to sell. Thus also a person who is actually employed with some firm may sell the future earnings of his present employment, but he cannot make a present sale of the earnings of an employment which he expects to get. In the latter case, the earnings have no potential existence. He may, however, promise to sell them.

The English rule was laid down in a leading case:<sup>1</sup>

A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to be assigned thus becomes a complete assignment. If a person contracts for value to settle all such real estate as his father shall leave him by will, or purports actually to have by the deed of such real estate, the effect is the same. It is a contract for value which will bind the property, if the father leaves any property to his son.

This is simply a longer way of saying that while a

<sup>1</sup> Collyer vs. Isaacs, 19 Ch. D. 34 Q. at 351, C. A.

sale of future property which has no existence and does not belong to the seller is invalid, if the seller subsequently does acquire ownership of the things which he purports to have sold, the vendee will then be entitled to treat the contract as a sale.

The distinction may be made clearer by saying that a person may not make an executed sale of a thing which has no actual or potential existence; but he may make an executory sale of something which he does not own and which may not exist: that is, he may make a contract to sell, of which execution may be demanded or enforced. As will be readily seen, this is the kind of contract that is made in the ordinary course of business, where, for example, a wholesale house takes orders for goods which it must buy in order to fulfil its contracts.

If there is an agreement to sell certain specific goods, which later are destroyed without the fault of either party and before the risk has passed to the buyer, the agreement is discharged, and the buyer, who may have paid something on account, can get his money back.

We have spoken so far of goods as things which may be the subject of sale, that is, of corporeal things. Incorporeal things, such as rights, may also be bought and sold. Thus a member of the Toronto Stock Exchange has certain membership rights, and he may sell his stock exchange seat, as it is called. An artist may protect his drawings by copyright, but he may sell to other persons the right to print certain repro-

ductions of his copyrighted pictures. In an American case, it was held that a man could sell his knowledge of the existence and location of an oil-well. A ferryman may sell his franchise to conduct a ferry. A license to carry on mining operations may be the subject of a sale.

It has long been a question of discussion whether a person may sell a mere expectancy based upon chance. In the case of a conditional sale, something which is hoped for is sold, that is, something which in the ordinary course of nature it is expected will come into existence, as a future crop or the young of animals. If the thing does not come into existence there is no sale, as the subject matter of the contract has failed, provided the seller had nothing to do with preventing the thing from coming into existence. This is different from the sale of a mere hope or chance, because here the chance is what is sold: for example, if a pearl fisherman before starting out sells his chance of what he may get, the contract is binding. As was said in an English case: "If a man will make a purchase of a chance, he must abide by the consequences."<sup>1</sup>

5. *Statute of frauds.*—The principles of the English Statute of Frauds may be said to apply in a general way throughout Canada. The seventeenth section of the English Statute provides that:

No contract for the sale of goods, wares and merchandise for the price of £10 sterling or upwards shall be allowed to

<sup>1</sup> Benjamin, 5th Ed. 126-127.

be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

This statute was later amended by the act known as Lord Tenterden's Act, which provided that the principles of the statute should apply to agreements to sell as well as to the sale of goods. Later the Sale of Goods Act of 1893 was passed, and this act is in force in some of the English law provinces. The amount fixed in the various provinces to replace the £10 sterling of the English act varies. Thus in Manitoba, Alberta, Saskatchewan, British Columbia, Yukon Territory and Quebec, the amount is \$50, in Ontario, New Brunswick and Nova Scotia, \$40, in Prince Edward Island, \$30 and in Newfoundland, \$50. Section 4 of the Sale of Goods Acts provides:

(1) A contract for the sale of any goods of the value of £10 or upwards is not to be enforceable, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum of the contract in writing be made and signed by the party to be charged, or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such future contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section, when the buyer does any action in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

In Quebec the Statute of Frauds, as amended by Lord Tenterden's Act, is embodied in Article 1235 of the Civil Code. The article, however, does not adopt the principles of the Statute of Frauds without making certain changes: for example, the Statute of Frauds fixes the limit at £10 sterling only in the case of the sale of merchandise, whereas Article 1235 applies the limit of fifty dollars to four different cases. Again, Lord Tenterden's Act apparently does not deny the right to prove by witness that some act has been done to interrupt the prescription which results from a partial payment, or payment on account; whereas Article 1235 lays down the opposite rule.<sup>1</sup> Article 1235 reads as follows:

In commercial matters in which the sum of money or value in question exceeds \$50, no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former, in the following cases: (1) Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions; (2) upon any promise or ratification made by a person of the age of majority of any obligation contracted during his minority; (3) upon any representation or assurance in favor of a person to enable him to obtain credit, money or goods thereupon; (4) upon any contract for the sale of goods, unless the buyer has accepted or re-

<sup>1</sup> Mignault, Vol. 6, p. 88.

ceived part of the goods, or given something in earnest to bind the bargain.

The foregoing rule applies altho the goods are intended to be delivered at some future time, or are not ready for delivery at the time of the contract.

In so far as a contract of sale is concerned, however, the rules in the English law provinces and in the Province of Quebec are practically alike. In the United States, there is a conflict of decisions upon the question, whether or not the rule applies to goods which have to be manufactured to fulfil the contract. In the English law provinces and in Quebec this difficulty does not arise. As we have just seen, the Civil Code provides that the rule is applicable altho the goods are intended to be delivered at some future time, or are not ready for delivery at the time of the contract; and the Sale of Goods Act provides that the rule applies to the sale of goods which may be intended to be delivered at some future time, or which at the time of the contract may not be actually made, or fit for delivery, or for the making or completing of which some act may be necessary. Lord Tenterden's Act specially provides that the principles of the Statute of Frauds should apply as well to agreements of sale. Thus this principle is in force thruout Canada either by virtue of Lord Tenterden's Act or by virtue of the Sale of Goods Act, accordingly as these are adopted by the various English law provinces, and in the Province of Quebec under Article 1235.

6. *Satisfaction of the statute.*—It is clear, there-

fore, that where there is a sale of goods of over fifty dollars (or over the minimum amount fixed by the laws of the particular province—see Section 92, *supra*), proof cannot be made by oral testimony, unless the statute can be satisfied by proof of at least one of the following circumstances:

- (a) That there has been part payment;
- (b) Acceptance and receipt by the buyer;
- (c) Some written note or memorandum of the contract signed by the parties or their authorized agent.

What may be acceptance under the rule has been the subject of many decisions. The Sale of Goods Act provides a rule which would be generally acceptable, namely, that there is an acceptance of goods within the meaning of the act when the buyer does any act in relation to the goods, which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. This definition brings out the distinction between an acceptance of the goods and a recognition of the contract. If there has been some act on the part of the alleged purchaser which shows that he recognized the fact that there was a contract, an action against him will be maintained without the necessity of written proof. He will be held to have accepted.

This does not mean, however, that he will be deprived of his right to show that he did not accept the goods, or that he will not be able to plead that the goods were not up to sample or otherwise. It means

simply that one of two possible defences is not open to him. If he had not recognized the contract in any way, that is, accepted the fact of its existence, and he had not signed any written document, he could plead the fact and get the action dismissed, irrespective of the fact that he might have another plea that the goods were not up to sample, or were not what he ordered. But if it is held that there was not sufficient evidence of his having recognized the existence of the contract, then, whether he has signed a writing or not, the creditor may bring action, tho the debtor's right to raise the question of the proper fulfilment of the contract is still reserved to him.

Thus in an English case, the defendant, a miller, orally bought of the plaintiff by sample eighty-eight quarters of wheat. The wheat was shipped by the plaintiff's agent on a barge, which arrived at the defendant's mill, and the next morning thirty-eight of the sacks were hoisted up into the mill and examined by the defendant, who then directed the bargemen to send up no more, as the wheat was not equal to sample. The same day he told the plaintiff's agent that the wheat was not equal to sample and that he would not take it. The defendant subsequently returned the thirty-eight sacks to the barge. In an action for the price, or for damages for non-acceptance, the jury were directed that there was evidence of an acceptance sufficient to satisfy the Statute of Frauds, altho the defendant was not thereby pre-

cluded from rejecting the wheat if not equal to sample. As a matter of fact, in this case the jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the Statute of Frauds, and gave a verdict for the plaintiff. This decision was confirmed by the English Court of Appeals. It is not essential in every case that the buyer must have had actual physical delivery of the goods. He may have had a constructive possession or delivery of them. The parties may have agreed that the seller shall hold the goods as bailee of the buyer, in which case the buyer has the constructive possession of them. They may be in the possession of the buyer for some other purpose, and he and the seller may agree that henceforth he shall retain possession as owner. They may be in the possession of a third party, and it may be agreed that they shall remain in the possession of such third party as bailee for the buyer. In all these cases no actual physical delivery is necessary, because the buyer has the constructive possession.

The giving of earnest and the part payment of the price, as they are independent of the main bargain, may be proved by oral evidence. The part payment must be accepted as such, and on account of the price. There is authority for the view that the part payment or the something given in earnest to bind the contract "need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller on account, or

in part satisfaction of the price, will be equivalent to part payment.”<sup>1</sup> And it has been held in England that under the Statute of Limitations there is part payment of the debt where there is an agreement that the debtor should board and lodge the creditor at a fixed price per week, in deduction of the debt.

It is essential to have some idea of what the note or memorandum in writing must be. The parties need not reduce their contract as a whole to writing; they may make a contract of which only part is in writing. Thus A may agree to build a garage for B, and they may draft a simple writing to that effect, which B signs. This writing may not mention the price. Parol evidence may then be made to show what was the price agreed upon, as the writing is a sufficient note or memorandum to make possible the rounding out of the contract of the existence of which it is proof.

The difference between a mere memorandum and a written contract has been expressed as follows:<sup>2</sup>

When a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing in that it may be made at any time after the contract, if before action commences; and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent; and if the terms of the bargain can be calculated from it, altho it be not expressed in the usual form of an agreement.

The note or memorandum need not be formal. It

<sup>1</sup> Benjamin, “Sale,” 5th Ed., p. 227.

<sup>2</sup> Sievewright vs. Archibald, 1851, 17 Q. B. at 107.

should contain the terms and subject matter of the agreement, and the names or descriptions of the parties, and need be signed only by the person who is sought to be charged. Generally speaking, if the note or memorandum consists of several separate papers, they must be attached to each other, so as to indicate that they are in reality but one instrument, or it must be clear from their contents that they relate to one another. Parol evidence must not be admitted to connect them.

What may be a note or memorandum has been well explained as follows:<sup>1</sup>

The court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose. A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and its contents were sufficient, would do. The question is not, what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum?

*7. Contracts for work and labor.*—A, who is a maker of cabinets and desks, accepts an oral order from B to make a desk for him according to certain specifications. A makes the desk and tenders it to B, who refuses to accept it, and upon being sued takes refuge under the Statute of Frauds. What is the position of the parties? A, it is presumed, has supplied

<sup>1</sup> Benjamin, p. 246.

all the materials, as well as the work; the result of his work upon his materials is a desk—a chattel. Under the English law, it is held that such a contract is a contract of sale between A and B. Conversely, if A supplies no materials, but only the work and labor, the contract is one only of work and labor, in which case B would not be able to plead the Statute of Frauds.

In certain of the American states, A's contract would not be looked upon as a contract of sale, but as a contract for work and labor, and therefore B's plea would not be good. Thus in Massachusetts, it is held that since the contract is for a chattel made to a special order, it is for work and labor. In New York, the view is that since the contract is for a chattel not in existence when the contract is made, it is for work and labor. In Quebec, the tendency would be, under the decisions, to regard the contract as a mixed contract of sale and for labor, and to allow oral evidence, on the ground that the transaction is commercial in nature, but is not a contract of sale. This is a very general statement of the law, and fuller explanation would require a complete outline of the decisions to date.

**8. *When title passes.***—It may be of the utmost importance to determine when title in property which is sold passes from the seller to the buyer. The general rule is that a contract is complete the moment the consent of the parties is expressed, altho delivery may not be then made. If the title does not pass to

the purchaser at once, the seller bears the risk of the loss of the thing before delivery. His creditors may seize the property, and until the title passes, the seller is entitled to appropriate any gain or increase that may arise. If he dies, the title to the property passes to his heirs or representatives. If the title passes to the purchaser at the moment of the contract by the mere consent of the parties, then the vendor's creditors or heirs have no more right to it than he has. If the thing perishes while in his possession, if he is not at fault, the purchaser must suffer the loss. The English rule is to the effect that unless it is otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not. If delivery has been delayed by the fault of one or the other, the goods are said to be at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Whether or not it is intended in a particular case that the property in the thing sold should pass to the purchaser will be a question of fact, and will be decided by what appeared to be the intention of the parties at the time. The risk attaches to the ownership of the goods. The parties may, however, by agreement arrange that one or the other shall bear the risk. An agreement to this effect may be inferred from a course of dealing, or from usage, binding on both. The courts will not find that the buyer has

assumed the risk before the property has vested in him, unless his intention to do so is expressed, or is clearly to be inferred from the circumstances.<sup>1</sup> Thus in an English case a contract for the sale of a cargo of ice was under consideration. The contract read in part as follows:

The vendors forward bills of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers and navigation, of whatever nature or kind soever, and the said Playford agrees to buy and receive the said ice on its arrival at ordered port . . . and to pay for the same in cash on delivery at 20s. per ton, weighed on board during delivery.

The ship was lost at sea. The sellers brought action for the price of the ice, and the purchaser pleaded that the cargo did not arrive at the ordered port. It was held that as the ice did not arrive, the property did not pass by the terms of the contract, and would not pass until the ice was weighed on board; that consequently the time for payment had not arrived, and that the defendant was not liable; that the provision with regard to risk was to protect the seller from liability for non-delivery caused by dangers of the sea.<sup>2</sup> This judgment was reversed in the Exchequer Chamber, on the ground that the property passed on shipment and delivery of the bills of lading, and that the purchaser had stipulated that upon receipt of the bills of lading the purchaser "takes upon himself all risks and dangers of the seas, etc." Having under-

<sup>1</sup> Benjamin, pp. 402-3.

<sup>2</sup> Castle vs. Playford, 1870, L. R. 5 Ex. 165.

taken all the risks and dangers of the seas, and agreeing to buy and receive the said ice, the defendant was bound to his contract to pay if delivery was prevented by dangers of the sea, and it was immaterial whether the property passed or not.

In another case 1,090 sugar loaves, comprised in four batches, marked and lying apart in a warehouse, were sold by the manufacturer to a broker. Each loaf weighed from thirty-eight to forty-two pounds and was, according to usage, weighed on being taken away by the buyer. The terms were: "Prompt at one month; goods at seller's risk *for two months*." The goods had been paid for in advance of being weighed, at an approximate sum, which was to be afterward definitely adjusted and settled when the goods came to be weighed and delivered; and part of them had been taken away by the purchaser. The residue was destroyed by fire *after the lapse of the two months* and before being weighed. It was held that the property had passed to the purchaser, the parties having, by fixing upon a provisional estimate of the price, shown an intention that the property should not depend upon the weighing to fix the exact amount, and the goods being specific. The fact that the contract provided that the goods should be at the seller's risk for two months, showed that it was intended that the property should be in the buyer, as otherwise such a provision would not be necessary.<sup>1</sup>

The general rule is that when things which are

<sup>1</sup> This decision is reproduced as outlined in Benjamin, p. 404.

movable are sold by weight, number or measure and not in the lump, the sale is not perfect until they have been weighed, counted or measured; but the contract may stipulate the contrary. If, however, the subject matter of the sale is complete and in a deliverable condition, then, as we have seen, the title or property in the thing sold passes at once, altho delivery may be delayed.

9. *Conditional sale.*—Goods may be sold subject to some condition: for example, if a thing is sold upon trial, the presumption is that the sale is made upon a suspensive condition, unless there is apparent a contrary intention. The title would not pass in this case until the buyer had indicated his approval and his intention to buy. If he retains the thing sold to him on approval for an unreasonable time, or for a period longer than that agreed upon, his approval will be implied. If he in turn sells the goods to another, his approval will naturally be implied.

It has been laid down in one or more English cases, that where the contract is to the effect that the buyer may at his option rescind the sale by the return of the goods, and the goods are destroyed or injured while in his possession, but without his fault, he is not liable to pay the price because of his inability to return the goods. It is said that the risk attaches to the person "who is eventually entitled to the property in the chattel." Of course the buyer who has such a right of option should exercise it within a reasonable time.

When goods are ordered from a distance, at what time does the title to them pass to the buyer? A merchant in Toronto writes to a merchant in Montreal giving him an order to forward one thousand bars of pig iron of a certain kind. The merchant in Montreal must proceed to select the bars, and to appropriate them to the contract. The mere fact that he selects them cannot be said to transfer the ownership of them; supposing even that he lays them aside in his warehouse, undoubtedly he may change his mind and select another lot. It is probable that the bars are not appropriated to the contract until they are dispatched by being placed in a car, or until some other act is done from which it may be inferred that the seller has divested himself of the possession and ownership of them.

Benjamin gives the following example: he supposes that A sells out of his brick yard one thousand bricks to B, who is to send his cart and take them away. Here B, says Benjamin, is to do the first act, and cannot do it until the selection is determined. He may go about the yard from stack to stack and select the bricks, and he may change his mind from time to time, up to the point where finally he determines the selection by putting the bricks into his cart to be taken away. Once that is done, his selection is determined, and he cannot change his mind and replace the bricks he has taken by others. If on the other hand it had been agreed that A was to load the bricks into B's cart, A would be free to select the

bricks, and to change his mind as to his selection until he had finally loaded the bricks into B's cart. Lord Blackburn has laid it down that:

It follows from this that where from the terms of an executory agreement to sell unspecified goods, the vendor is to dispatch the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act is commenced, for then the appropriation is made finally and conclusively by the authority conferred in the agreement.

And in Lord Coke's language:

The certainty and thereby the property begins by selection. But however clearly the vendor may have expressed an intention to choose particular goods, yet until the act has actually commenced, the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him.<sup>1</sup>

In an interesting English case<sup>2</sup> there was an appropriation by the seller to which the buyer later assented. The seller had a lot of sugar in bulk. The buyer bought twenty hogsheads of it. The seller filled and delivered four hogsheads, and later filled the sixteen remaining hogsheads, set them aside and then gave notice to the buyer to take them away. This the buyer promised to do. It was held that there was an assent to the appropriation of the sixteen hogsheads, and that the property therein passed to the buyer. This decision will be better understood when we say,

<sup>1</sup> Blackburn on "Sale," p. 128.

<sup>2</sup> Rohde vs. Thwaites, 6 B. & C. 388.

that when a person buys an unascertained portion of a larger bulk, he acquires no property in any part until there has been a separation of the portion, and until it has been appropriated to the contract by the consent of both parties, tho this consent may be express or implied.

Where the goods sold are delivered to the carrier, the presumption is that they are appropriated to the contract, because it is assumed that the parties so intended. It may have been intended, however, and if so it may be shown that the title should not pass until the buyer actually got delivery. For supposing that the seller, while he appropriates the goods to the contract and actually dispatches them, keeps control of them by taking the bill of lading in his own name, it is clear that, under these circumstances, the seller has no intention of parting with the title to the goods until he is sure that the buyer is solvent, and can and will pay for them.

Frequently goods are sold and shipped C.O.D. The courts are by no means unanimous in their holdings as to when the title passes to the buyer. It has been held in some cases that title passes to the buyer when the goods are received by the carrier; in other cases that they do not pass until the buyer pays for them. Certainly, however, if the buyer does not pay for them he is not entitled to the possession of the goods.

The general rule is that where things movable are sold by weight, number or measure, as part only of a

mass, and not in the lump, the sale is not perfect until they have been weighed, counted or measured. In other words, the part that is sold must be separated from the mass, and the weight, and number of measure ascertained before the sale is complete. Ordinarily the buyer should have notice or knowledge that the weighing, measuring or counting has been performed, or he should be present thereat. This case is distinguishable from the case where several persons are owners or tenants, in common, of a mass of goods. Thus A, B and C may own in common, in equal or in unequal proportions, all the wheat in a certain elevator. Any of them may sell and give a good title to his portion of the wheat, altho it is mixed with that of the others. Delivery could be made by merely handing a delivery order to the purchaser, who would be entitled to deal with the portion of the wheat which he had bought. Such a sale is perfect without the portion which is sold being separated from the mass. But if A were to sell one thousand bushels of his portion, the sale would not be complete until the thousand bushels were measured out, and the measure checked or accepted by the purchaser.

*10. When the seller retains possession.*—As we have seen, a sale of an article may be made, upon which the title to the article passes immediately to the purchaser. The seller may, however, retain possession. Such a transaction must be in absolute good faith, and must not be made simply to enable the seller to say to his creditors that the article in question

had been sold to B. If in reality there was no sale, and B did not intend to take delivery, this sale would probably be held to be void, in so far as it would appear to have been made solely to benefit the seller. The purchaser would have to come forward and prove his honesty of performance, that the title actually passed to him but that, as a matter of convenience, the seller retained possession.

11. *Goods to be manufactured.*—When a contract is made for goods to be manufactured, a presumption arises that title is not to pass until the goods are ready for delivery. This presumption obtains even when the whole of the purchase price is paid at once, or when the buyer exercises a superintendence or control over the work. In some cases it is held that title does not pass until acceptance by the buyer of the manufactured article, but by the weight of authority it passes when the article is put in a deliverable condition.

It must always be remembered, in this connection, that there is a difference between an actual sale and a mere executory agreement to sell. In the case of an actual sale, the title to the thing sold passes at once to the buyer (this is the general rule) as soon as the contract is concluded, whether the goods be delivered to the buyer or remain in the possession of the seller. In an agreement to sell, the property does not pass when the contract is made; the goods remain the property of the seller until the contract is executed.

12. *Sales by sample.*—In the case of a contract for

sale by sample there is an implied condition that the bulk shall correspond in quality with the sample; that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. These rules are based upon jurisprudence, and may be taken to be generally applicable.

The title in goods sold by sample will pass when the goods are put in a deliverable condition, and are appropriated to the contract. The mere fact that a sample is exhibited does not make the sale a sale by sample. The sample may be shown, but the seller may refuse to sell by it, and it may be agreed that the buyer shall inspect the whole at his own risk.

On the other hand, the buyer may be unwilling to trust to the sample, and may demand an express condition or warranty. This follows from the rule that a contract for sale by sample must be express or implied. It may be shown that the sale was a sale by description and not by sample. For example, where the seller accepted a sale of sassafras wood and the buyer inspected it, and he was experienced in buying such wood, but the seller described the goods in the contract as "fair merchantable sassafras wood," the seller was held bound to deliver fair merchantable sassafras wood, as the goods had been sold upon this description and not upon the sample.

In an American case decided by the Court of Ap-

peals of the State of New York,<sup>1</sup> an average sample was taken of a large quantity of beans contained in a number of packages, by drawing samples from all the packages and mixing them together, it was held that the purchaser could not reject any of the packages on the ground that they were inferior to the average, nor recover for the difference in value on that ground. It was laid down that the true test was, provided that the contents of all the packages delivered were mixed together, whether the quality of the bulk so formed was equal to that of the average sample drawn.

An interesting case was decided by the Supreme Court of the United States in 1870.<sup>2</sup> A commission merchant in Boston instructed his brokers to sell a quantity of foreign wool received, but only in case the purchaser came to Boston and examined the wool for himself. The broker sent the prospective purchasers at their request samples of the wool, as a result of which the latter were to make an offer of fifteen cents a pound, all round, if the goods were equal to the sample furnished. This offer was accepted, with the proviso, however, that the purchasers would examine the wool on the following Monday, and should on that day declare whether they would take it or not. The purchasers went to Boston and examined four bales, as fully as they wished, and were informed that they could examine the remaining bales or have them

<sup>1</sup> Leonard vs. Fowler, 42 N. Y. 289.

<sup>2</sup> Barnard vs. Kellogg, 10 Wall. 383.

opened for inspection. This they declined. The goods were bought, and later, when they were opened by the purchasers, it was found that some of the bales had in the middle of them a quantity of rotten and damaged wool, concealed by the outer layers which were in good condition. The purchasers brought action to recover for their loss. The good faith of the seller was not doubted. The action was based upon the following grounds: that the sale was a sale by sample, and that there was a promise express or implied that the bales should not be falsely packed. The first court held that there was no express warranty that the bales which were not examined should be up to the standard of those which were examined, but that by the custom of merchants and dealers in foreign wools in Boston, there was an implied warranty that the goods were of the same quality thruout, in view of the fact that to examine each bale separately would be a work of great length and practically an impossibility; and that, as a result, this warranty arising out of custom was binding on the seller. In the Supreme Court, however, this decision was set aside on the following grounds: (1) that as the purchasers had gone to Boston to inspect the goods for themselves, the sale could not be said to be a sale by sample; the purchasers had in reality had an opportunity to examine the goods, and must be held to have assented that the sale should take place after such examination as was made; (2) that by the rule of the common law, where a purchaser inspects

for himself the specific goods sold, and there is no express warranty and no fraud on the part of the seller, who is not the manufacturer nor the grower of the goods sold, the maxim *caveat emptor*—let the buyer beware—applies, and (3) that as by law no warranty is implied under the circumstances, it is not permissible to make evidence that by custom such a warranty is implied. This is especially true in this case as it was not shown that the parties had any knowledge of the custom, and therefore were not transacting with a knowledge thereof.<sup>1</sup>

### REVIEW

Distinguish between sale and a contract to sell; between sale and barter; between sale and gift; between sale and bailment.

Who may be parties to a sale?

Define actual and potential existence. May a valid sale of incorporeal things be effected?

What is the provision of the English Statute of Frauds in regard to the sale of chattels? In what ways may the Statute be satisfied?

What is the general rule about the completion of a contract? At what time does the title pass to the buyer in a conditional sale; in a C.O.D. sale; in sales by sample?

<sup>1</sup> This holding is summarized from the outline given in Benjamin, p. 643-4.

## CHAPTER XI

### SALES: PERFORMANCE OF THE CONTRACT

1. *Delivery of the goods.*—The principal obligations of the seller are the delivery and the warranty of the thing sold: reciprocally, the obligations of the purchaser are to receive the goods and to pay the price. The general rule is, where there is no contrary arrangement, that upon delivery the price must be paid. The seller cannot sue for the price before offering to deliver, nor can the buyer sue for the goods before tendering the price.

By delivery is meant the transfer of the thing sold into the power and possession of the buyer. The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, with all hindrances thereto removed.<sup>1</sup> The English Sale of Goods Act says that delivery means voluntary transfer of possession from one person to another. Delivery in this sense, then, means a transfer of possession. The word is, however, capable of various shades of meaning and application. If the goods are already in the possession of the buyer when the sale is made, no further delivery is necessary. The delivery in such a case is completed by the seller's expression of

<sup>1</sup> Quebec Civil Code, Article 1493.

consent that the title shall pass to the buyer and that he shall remain in possession. When a sale has been made, the buyer's right is to take possession, and the seller's duty is to give possession. It may be agreed, however, that the seller shall retain possession until some condition is fulfilled, as, for example, until payment of the price in full or in part, or until the buyer calls for delivery; it may be that the parties will agree that the buyer shall take delivery in instalments. The goods may be sold on credit, in which case there is a transfer of title and a transfer of the right of possession. In this case, however, supposing that before obtaining actual possession the buyer becomes insolvent, the seller may refuse to part with possession, in order to retain his lien on his only means of obtaining payment.

When incorporeal things are sold, there must nevertheless be delivery to complete the sale. The delivery of incorporeal things is made by delivery of the titles, or by the use which the buyer makes of such things to the knowledge of the seller.<sup>1</sup>

2. *Place of delivery.*—Where delivery shall take place is a matter to be arranged by the parties, or to be implied, according to circumstances. If there is no contract, express or implied, the place of delivery is the seller's place of business or, in the absence thereof, his residence. If the contract is for the sale of specific articles which, when the contract is made, the parties

<sup>1</sup> Quebec Civil Code, Article 1494.

know are in some other place, that place will be the place of delivery, unless it is agreed otherwise. It may, of course, be implied from a course of dealing between the parties, from general usage, or from the nature of the goods, that delivery is to be made elsewhere than at the place of business or residence of the seller. If, under the contract, the seller is bound to send the goods to the buyer, and no time for doing so is named, he must send them within a reasonable time. If the seller is not to deliver until the purchaser has performed some act or fulfilled some condition, the seller will not be held in default for non-delivery until the purchaser has notified him of the performance of the act upon which delivery is to be made. If A, the owner of a ship, buys supplies from B, and the arrangement is that the supplies are to be delivered as soon as the ship is ready to receive them, A must notify B of the name and berth of the ship, and of his readiness to take delivery, before he can complain that delivery has not been made.

Unless it is otherwise agreed, the expenses of delivery, which will include the putting of the goods into a deliverable state, must be borne by the seller, and unless it is otherwise stipulated, the expenses of removing the thing are at the charge of the buyer. Hence if the buyer is compelled to pay the expenses of delivery thru the fault of the seller, he can recover the amount from the latter. If the seller does not pay the expenses, it has been held that he may be

prevented from alleging or proving that he is ready and willing to deliver, and the buyer may be entitled to refuse to accept the goods.

**3. *Delivery to a carrier.***—If the seller is, under the contract, authorized or required to send the goods to the buyer, his obligation is fulfilled by delivering them to a carrier who may or may not be named by the buyer, but who is nevertheless deemed to be the agent of the buyer for the purpose of transmission. Hence delivery to the carrier is as a rule delivery to the buyer. There can be no doubt about it if the delivery is made to a carrier who is named by the buyer. This position will not be altered by the fact that the seller makes a contract with the carrier; he will be held to have made it on behalf of the buyer, even tho he pays the carrier. His contract with the carrier must be reasonable, having regard to the nature of the goods, the necessity for quick transport, the necessity for protection against the weather, and so on.

Under the English law, at least, if the seller omits to exercise such care in instructing and making his contract with the carrier, and as a result the goods are lost or damaged in transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or he may sue the seller for the damages he has suffered. Delivery to a carrier of the goods contracted for, to be shipped by a method different from that provided by the contract, is not such a delivery as is contemplated by the parties. Thus, where goods

were sold by the plaintiffs to the defendant, and by the contract between them the goods were to be shipped by freight, and were handed by the plaintiffs to a railway company, to be shipped by express to the defendant, and were not in fact delivered to him, it was held that the defendant was not liable for the price of the goods. The fact that the goods were shipped by a faster means of transportation, which might be for the benefit of the defendant, but without his knowledge or consent, could not change the rights of the parties under the contract.<sup>1</sup>

The presumption that the carrier is the buyer's agent may be rebutted; for example, if the seller reserves the right of disposal of the goods by taking a bill of lading to the order of himself or a third person, in order to insure payment of the price, the bill of lading must be indorsed by the seller or such third person, and this constitutes delivery, but not to the purchaser. In this case the carrier would be deemed to be the agent of the seller, and if the goods were lost or damaged in transit, the loss would be upon the seller. If the seller, in making a sale of goods, should undertake that he would make the delivery himself at some place other than that where they are when sold, the carrier is the seller's agent, and the risks of carriage are assumed by the latter. Tho the carrier may be the agent of the seller, the buyer takes the risk of deterioration in the goods, which is necessarily incident to the course of transit, because such risks

<sup>1</sup> McGowan Cigar Co. vs. O'Flynn, 19 O. L. R. 877.

would arise whether the carrier were the agent of the buyer or of the seller. Thus in an English case it was held that where hoop-iron was sold in Staffordshire, deliverable in Liverpool in the winter, and the iron was rusted and unmerchantable when delivered in Liverpool, the seller had made a good delivery, upon proving that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire.<sup>1</sup>

4. *Time of delivery.*—If the seller is bound to make delivery of the goods, either to a carrier or to the buyer direct, delivery must be made at the time fixed in the contract. If no time is fixed, delivery must be made within a reasonable time.

What may be a reasonable time will depend upon the circumstances in each case. If it is agreed that delivery is to be made at a time to be fixed later, as, for example, by the buyer, the seller will be entitled to await notice from the buyer, calling for delivery. If a time for delivery has been fixed, then the buyer may refuse to take delivery either before or after such time. If the contract provides for delivery "immediately," "forthwith," or "as soon as possible," a reasonable time will be allowed for delivery. What may be a reasonable time will be a question of fact. If A makes a contract with B to buy certain goods, which are to be delivered at some time between the 1st and the 30th of the next month, B may deliver the goods

<sup>1</sup> Bull vs. Robinson, 1854, 10 Ex. 342.

on the 1st or the 30th day of the month, or on any intervening day.

If the contract does not state the hour at which delivery is to be made, it must be made at a reasonable hour. Delivery cannot be demanded or be made at an unreasonable hour; it should be made or demanded as a rule during business hours. It has been laid down that if delivery is to be made at a specified place, where the buyer must be to receive the goods, the delivery should be made before sunset. The rule is not a hard and fast one, however, so that if the buyer happened to be at the place designated for delivery, and the goods could be easily examined, a tender of delivery, tho made at night, would probably be sufficient.

5. *Quantity specified must be delivered.*—The seller must deliver the full quantity sold as it is specified in the contract. The buyer cannot be forced to accept less or more than he has contracted to buy. Thus it was held that where a contract for the sale of goods is an entire one, and the vendor withholds any of them, the purchaser need not accept delivery of the remaining portion, but may repudiate the agreement and recover any money paid on account of the purchase price.<sup>1</sup>

When a person has purchased goods to be delivered as a whole, he need not accept them in instalments. It is his privilege to reject fulfilment of the contract

<sup>1</sup> Blomquist vs. Tymchorak, 22 W. L. R. 205.

in any other way than as specified. If, however, he accepts less than the goods he has contracted for, or accepts instalments thereof, he must pay for them at the contract rate. Generally speaking, if the seller delivers a larger quantity of goods than was purchased, the buyer may accept the goods covered by the contract and reject the balance, or he may reject the whole. If he accepts all that are delivered, he must pay for them at the contract rate.

Thus if A purchases ten hogsheads of wine from B and B sends fifteen, A may consider the contract as not performed, for he is unable to tell which are the ten that are to be his, and he is not bound to make a choice of any ten hogsheads, for that would be to force a new contract upon him. The delivery of more than ten is really a proposal for a new contract. Apparently, also, if the seller delivers the goods that have been bought with other goods not covered by the contract, the buyer may accept the goods covered by the contract and reject the rest, or he may reject the whole.

Where a person contracted to deliver one hundred bags of hops on or about January 1, and on December 12 he delivered twelve bags in part performance of his contract, and no time for payment was mentioned, it was held that he could not demand payment for the hops delivered before the expiration of the time fixed for delivery of the balance.<sup>1</sup> The fact that the buyer in this case accepted the twelve bags would not de-

<sup>1</sup> Waddington vs. Oliver, 2 B. & P. N. R. 61.

prive him of his right to sue for breach of the contract if the remaining bags were not delivered according to the contract.

The contract may be severable. A tender of the amount of any severable part is to the extent thereof sufficient; thus an instalment contract may provide that each delivery shall constitute a separate contract, in which case each delivery will stand by itself. If the seller makes default in connection with one such instalment, it is not as a rule open to the buyer to repudiate the remaining instalments. Thus if the contract is for the sale and shipment of iron ore at different times, payment to be made upon delivery, and one instalment of the ore shipped does not fulfil the requirements of the contract, the buyer is not justified, under ordinary circumstances, in refusing to accept the remaining shipments which conform to the terms of the contract. The failure of the seller to deliver a severable portion of the goods or articles contracted for, or the failure of the buyer to take delivery thereof, may, however, give rise to the right to repudiate the contract as a whole. Benjamin, discussing the matter, says:

A contract for the delivery of goods by instalments, tho the instalments are to be separately paid for, and the contract is in consequence so far divisible, is, like all other contracts, one that may be repudiated by either party if the other party refuses to perform it. But the question often arises whether a mere partial breach by either party justifies the other in repudiating the unfilled part of the contract. The rule at common law is that, in the absence of an express

refusal, the question to be considered is whether the conduct of the party in fault amounts to an implied refusal to perform the contract, for it is not every breach by one party which gives to the others the right of rescission. The breach must be in a matter going to the root of the contract. Such a breach negatives the readiness and willingness of the party in fault to be bound by the contractual relation any further, and may be accepted as an offer to rescind.

Generally speaking, it will depend upon the circumstances in each case, whether the breach in the fulfilment of part of the contract is a repudiation of the whole, or whether it is a severable breach which gives rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

6. *Quality specified must be delivered.*—Not only must the seller deliver the quantity purchased, but he must deliver goods of the quality specified in the contract. The buyer is entitled to a reasonable opportunity to inspect the goods, in order to determine whether they are of the quality mentioned in the contract. The seller must, when tendering delivery, give the buyer such reasonable opportunity as he desires to examine the goods for this purpose. Ordinarily the goods will be inspected at the place of delivery. The purchaser who takes the goods for the purpose and with the intention of inspecting them does not thereby accept them; and if he finds that they are not of the quality contracted for he may reject them. In such case he is not bound to return them to the seller, tho he must allow the seller to re-take them.

Where a purchaser was notified that certain goods

which he had bought were lying at a designated wharf ready for delivery on payment of the price, and he went to the wharf and applied for permission to examine the goods, and was shown two closed casks which were said to contain them, but was refused permission to open the casks, it was held that no valid offer of delivery had been made to him.

It has also been held that where a buyer had inspected the goods before the sale, and by the contract the goods were to be held by the seller subject to the buyer's orders and in good condition, he was entitled to further inspection before taking delivery. This further inspection was refused, and the buyer was held entitled to refuse delivery. If, on the other hand, the seller offers the buyer a reasonable opportunity to inspect the goods, and the buyer refuses to inspect them, the seller might be justified in refusing to make delivery.

7. *Symbolic or constructive delivery.*—An actual physical transfer of the thing sold to the buyer is not always essential to constitute delivery and to pass title. Where, for example, the goods sold are ponderous and incapable of being handed over physically from seller to buyer, an actual delivery will be dispensed with. In such a case the delivery of a key to the warehouse in which the goods are lodged will be sufficient. Similarly, the transfer to the buyer of bills of lading which represent the goods is a sufficient delivery. This would not be sufficient, however, if the goods are subject to liens or charges in favor of the bailee or other

person who has the physical possession of the goods, and who may retain them until his charges are paid. For example, if A ships goods to B by rail, and A has undertaken to pay the freight, but does not do so, the railway is entitled to hold the goods until its charges are paid. A may have forwarded documents of title to B, but these will not constitute delivery to B until A pays the freight charges.

8. *Warranties: definition and classification.*—A warranty is an agreement of indemnity, relating to the character, quality or title of the thing sold, and forming part of the contract of sale, tho collateral to its express object, by which the seller insures the buyer against loss or against failure of one or more of its terms. Warranties may be express or implied.

The parties may by special agreement add to the obligation of legal or implied warranty, or diminish its effect, or exclude it altogether.

An express warranty, therefore, is an explicit statement by the seller of some material fact concerning the subject matter of the sale, and in virtue of which the buyer is induced to make the contract. Such a warranty is collateral to the main purpose of the contract, and the breach of it as a rule gives rise to a claim for damages, but not to a right to reject the goods and to treat the contract as repudiated. The warranty may be oral or written. If the contract of sale is a complete document in writing, an oral warranty may not be admissible under the Parol Evidence Rule, unless it is fraudulent.

As a rule, antecedent representations made as an inducement to the buyer, but which do not form part of the contract when completed, are not warranties. If the representation is made in the course of the dealings leading up to the bargain, it will be a warranty, provided it is incorporated into the bargain as part of it. Thus a man bought a horse at auction without warranty. The day before the sale he examined the horse at the stables, and in the course of his examination the auctioneer said to him: "You have nothing to look for; I assure you he is perfectly sound in every respect," to which he replied: "If you say so, I am satisfied," and made no further examination. The horse proved to be unsound, tho the seller did not know it, and therefore there was no fraud. The purchaser brought action, and claimed that the conversation in question was a private warranty to him, altho the auctioneer put up the horse without warranty. It was held that this private conversation, and the representation therein made, did not form part of the contract which was made by the buyer when he bid for the horse. The representation was held to be merely an expression of the seller's opinion and judgment, and that he could not be held responsible for it, if, when he made it, he was in good faith.

A warranty may be made after the sale, in which case, under the English law at least, there must be a new consideration to support such subsequent warranty.

Legal or implied warranty is that which arises by

operation of law, without stipulation in the contract: it may also arise from usage or custom, or from the conduct of the parties. Thus it is an implied warranty in the case of a sale of goods by sample that the goods sold shall correspond in quality with the sample. There is an implied warranty that goods sold are in a merchantable state or condition; that there is no latent defect in the thing sold such as will render it unfit for the use for which it was intended, or which will so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price for it, had he known that the defect existed. Where, however, the defects are apparent and are such that the buyer might have known of them himself, the rule of *caveat emptor* will apply.

Generally speaking, if the buyer buys on his own judgment, that is, if he selects or defines the specific thing or class of things which he requires, there is not an implied warranty on the part of the seller that the things bought will fulfil the purpose of the buyer. If, on the other hand, the buyer tells the seller that he wants certain goods for a certain purpose, and leaves the seller to exercise his judgment and supply the proper goods, then there will be an implied warranty on the part of the seller that the goods are not only merchantable but that they are fit for the purpose expressed. Again, there is an implied warranty that when a thing is sold it is in existence. If A sells B a cargo of fruit which is supposed to be in transit between Havana and New York, and the day before the

sale the ship is wrecked and the fruit is destroyed, the sale is void, and B may recover what he has paid. It has been said that in such a case there is an implied warranty that the fruit is in existence when the contract is made. It is also said that the warranty is rather in the nature of a condition precedent which is of the essence of the contract, and not a collateral undertaking.

9. *Implied warranty of title.*—The Civil Code of Quebec lays down a rule generally applicable. The seller, it says, is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale, and against encumbrances not declared and not apparent at the time of the sale. In other words, the seller impliedly warrants his right to sell; that he has a title, and that he may give a free and clear title to the purchaser. If it turns out that the seller had not a good title, then the buyer may sue for a return of the price where he is compelled to surrender the thing to the true owner, as on a total failure of consideration, and may add to his claim a demand for damages, if he has suffered any.

If the thing sold is in the possession of the vendor, there is no doubt as to the presence of an implied warranty of his title and his right to sell. In the United States apparently there is no implied warranty of title if the thing is in the hands of a third person when it is sold. In England, however, this view is not

accepted. The mere fact that a person sells a chattel "implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

The vendor may have only the constructive possession of the things sold, as where he is the owner of an undivided portion of wheat stored in an elevator. The owner of the elevator has the actual possession, but the vendor has the constructive possession. In selling his undivided interest, however, there is an implied warranty of title.

There are one or two exceptions to the rule. If goods are sold by a sheriff or bailiff, as under the judgment of a court, the sheriff is not held to any warranty. So, also, a vendor may merely sell or transfer such title as he may have in the goods, provided he does so without positive knowledge that he has no title, and he will be held to no warranty. The liquidator or curator of the assets of an insolvent debtor is held to no warranty. It has been held that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that the patent has been granted to the seller.

10. *Implied warranty of quality, caveat emptor.*—In so far as the quality of goods is concerned, the maxim *caveat emptor* (let the buyer beware) is the

general rule. In other words, if there is no fraud, and the seller has not given an express warranty, or unless a warranty is implied from the nature and circumstances of the transaction, the buyer purchases at his own risk. This is the more true if the buyer inspects the goods or is given a reasonable opportunity to do so. If after being given such an opportunity, the buyer neglects to inspect the goods, it has been held that it is not the duty of the seller to point out defects. On the other hand, the seller must not assist in deceiving the buyer.

For example, the seller must not hinder the buyer in his inspection of the goods in an endeavor to discover defects. If the buyer purchases goods on his own judgment, or selects or defines the particular goods or class of goods which he wants, the seller need only furnish merchantable goods of the class indicated, altho he may know that the buyer wants the goods for some special purpose.

If, however, the buyer indicates that he wants the goods for a specific purpose and asks the seller to supply him with goods fit for that purpose, and he leaves the choice to the seller, a warranty at once arises on the part of the seller that the goods chosen by him will meet the buyer's requirements for the purpose mentioned.

If the goods are bought by sample, the buyer has acted upon his own judgment in that he has examined the sample, but he relies on the seller's judgment to

supply a bulk of the goods sold which will correspond with the sample; there is, therefore, an implied warranty on the part of the seller that the goods which he will deliver will be of the same quality as the sample, and that they will be merchantable. If the goods are sold by description, a similar warranty arises that the goods sold are of the kind described. Apparently in such a case there is not a warranty of merchantability, unless the seller deals in the goods sold. Thus, where a man <sup>1</sup> ordered a quantity of "spent madder," and this substance was not manufactured by the seller, but was merely a refuse product of his manufacture and was sold only as such, the buyer's intention being to produce garrancine, which it was found the madder would not produce, it was held that the purchaser took the risk that the madder might not produce the desired by-product. The seller was not a dealer in spent madder.

11. *Remedies for breach of an express warranty.*—Under the English law, in the case of an express warranty, the general rule is that if the goods tendered under the sale are not as warranted, the purchaser's remedy is an action in damages, if the title to the goods has passed to him. If the title has not passed to him, he may, upon discovering the breach of an express warranty, reject them. So if A sells to B a certain engine, and warrants that it will develop 200 h. p.; the engine is actually delivered to B, and B tries it out and finds that it will only develop 150 h. p., B cannot, if

<sup>1</sup> *Turner vs. Mucklow*, 1862, C. L. T. N. S. 690.

the title in the engine has passed to him, tender the engine back and demand the return of what he has paid. B would have an action in damages for breach of the warranty, and his damages would probably be the difference in value between the engine as represented and the engine as it really proved to be.

If, however, A sells B certain wheat stored in an elevator and warrants it to be first quality, and nothing is done by which B is given delivery, and B, having agreed to pay so much a bushel, inspects the wheat and finds it is only of second quality, B may refuse to accept the wheat, because the title has not passed to him, and there has been a breach of the warranty of quality. In the previous case, however, if A, when he made the warranty that the engine would develop 200 h. p., was aware that it could not do so, B would then be entitled to hand back the engine and demand the return of what he had paid.

**12. Remedies for breach of an implied warranty.**—If the goods sold do not conform with the implied warranties as to quality, fitness, condition, or otherwise, the buyer has several remedies.

(a) He may, if he thinks fit, reject the goods and recover what he has paid.

(b) He may accept and keep the goods and sue for the damages he has suffered by the breach of the warranty.

(c) If he has not paid the purchase price, he may set up the damage he has sustained in diminution of the price.

If the buyer decides to reject the goods and rescind the sale, he must do so within a reasonable time. If the seller refuses to take back the goods, the buyer may bring action to have the sale declared null and for the return of what he has paid, meanwhile holding the goods as bailee for the seller: that is, he holds them at the risk of the seller, and if they perish thru no fault of the buyer he is not liable for the loss.

*13. Rights of an unpaid seller against the subject of the sale.*—As we have seen, the contract of sale is complete by the consent of the parties to the contract, and unless it is otherwise provided the title in the goods passes from the seller to the buyer. The seller is entitled to payment.

So long as the seller retains the goods in his possession he has a lien on them for the price. His lien is not effective if the sale was made on credit, unless the time allowed for payment has expired.<sup>1</sup> Thus A sells a carload of pulp to B on sixty days' credit; a bill of sale is made out and delivered to B, but it is agreed that A shall keep the pulp in his warehouse for the time being. B, a month later, assigns the bill of sale to C, and then becomes insolvent. Upon the demand of C for delivery of the pulp, A may refuse delivery. It is true that by making a sale on credit he waived his lien, but as B became insolvent and A had possession of the goods, A's right of lien at once became ef-

<sup>1</sup> The lien extends only to the price. Charges for warehousing or otherwise, which the seller may have to pay, are a personal claim against the buyer, and give no right of retention of the goods.

fective, and C could have no greater right to the goods than B.

If at the time that A sold the pulp to B, unknown to A, B was insolvent, and the goods were shipped and a bill of lading was sent to him, an assignment of the bill of lading by B to C, who was named as assignee, would not defeat A's right of stoppage in transit. C is not a purchaser for value, and has only the right of B. If, however, B had sold the pulp and delivered the bill of lading to C before A exercised his right of stoppage, C would be entitled to receive the goods. The seller's lien exists therefore, and he can refuse delivery, where the sale is for cash, or where the sale is on credit and the buyer has become insolvent before the goods are delivered to him.

It must be understood that unless it is otherwise agreed the seller's lien exists only so long as he retains possession. If he delivers the goods to the buyer, or to the buyer's agent, as, for example, to a carrier, the right of lien disappears because the seller has parted with possession.

There is an exception to this rule, in that if the sale is on credit and the buyer becomes insolvent after the goods have been delivered to the carrier and while they are in transit, the seller may retake possession.

Of stoppage *in transitu*, Benjamin says:

This is a right which arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and quality that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the seller

has delivered the goods out of his own possession and put them in the hands of a carrier for delivery to the buyer (which is such a constructive delivery as divests the seller's lien) he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying the debts due by the buyer to other people. The statement that this right is based on the reason that one man's goods shall not be applied to the payment of another man's debt is, however, not literally accurate, for, strictly speaking, the goods so stopped are no longer the property of the unpaid seller, and stoppage *in transitu* takes place only where the goods have become the property of the buyer. Where they remain the property of the seller, the latter may withhold them by virtue of his ownership, but this is not the peculiar right of stoppage given by the law merchant . . . the right of stoppage *in transitu* is a right to interfere and prevent the buyer from taking actual possession which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to an agent to forward. This power does not exist except in the case of insolvency.<sup>1</sup>

The principle has been very clearly laid down also in an American case, as follows:

Stoppage *in transitu* is a right which the vendor of goods upon credit has to recall them or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third person has acquired bona fide rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a bona fide right to them. Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for a conversion of the goods if he declines to redeliver them to the vendor, or delivers them to the vendee. . . . And no-

<sup>1</sup> Benjamin, p. 870.

tice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his rights of stoppage *in transitu*, the notice is sufficient. And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier.<sup>1</sup>

It has been held that the mere fact that the seller has received part payment of the price will not defeat his right of stoppage *in transitu*. If the contract is severable and the goods may be delivered by stated instalments, which are to be paid for separately, and payment has been made of an instalment, the seller may exercise his right of stoppage only for the goods which remain unpaid.

The seller may have to comply with the reasonable demand of the carrier for a bond to protect it, where it has issued a negotiable bill of lading. An interesting question arises as to the rights of the seller to stop goods *in transitu*, where the bill of lading has been indorsed to some innocent third party for value by the buyer, while the goods are in transit. The view generally accepted is, that if the bill of lading is transferred by the buyer *for value*, as by way of sale, to an innocent third party, before the vendor has exercised his right of stoppage *in transitu*, the right of stoppage is defeated. But where there is no such document of title, such as a bill of lading issued by the carrier, a sale of the goods by the buyer does not defeat the seller's

<sup>1</sup> Reynolds vs. Railroad, 43 N. H. 580.

right, unless the sale has been made with his consent.

14. *Vendor's right of resale or rescission.*—A vendor who has a lien or has exercised the right of stoppage *in transitu* may do one of two things:

(a) He may constitute himself agent of the buyer and resell the goods,<sup>1</sup> if the buyer delays an unreasonable time in paying for them, or he may sell them at once if they are perishable. Notice of intention to resell should always be given, tho in some jurisdictions it has not been held to be necessary. A mere notice of intention is sufficient and need not contain a recital of the actual time and place of the resale. If the resale nets to the vendor less than the amount which the buyer agreed to pay, the difference may be recovered by the vendor as damages.

(b) The vendor may rescind the sale and resume the title to the goods if the buyer does not pay for them within a reasonable time. Notice of the rescission and retransfer of title should be given, tho it has been held not to be necessary. An intention to rescind should be shown by some word or act, as, for example, the consumption of the goods by the seller. If the vendor exercises his right of rescission he may sue the buyer for loss of profit. He has been allowed to sue for the entire purchase price.

15. *Actions by unpaid vendor for breach of contract of sale.*—If the property in the goods has not been transferred to the buyer, as, for example, where goods are sold which have to be weighed or measured

<sup>1</sup> Where the vendor sells as agent, the sale is subject to the usual rules.

before delivery, the goods are still in the seller's possession, and if the buyer refuses to take delivery, he will have only an action for damages. As a rule, he will not be able to recover the full price of the goods, but only the actual damages he has suffered. The rule is that in such a case the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract was broken. The idea is that the seller sell the goods, once the contract is broken, and thus determine his loss.

In one case goods were sold, to be delivered in the months of February and March following the contract, which was made in the month of November previous. The buyer became bankrupt in January. On the dates fixed by the contract, namely, in February and March, the goods were tendered, and, not being accepted, were resold at a heavy loss. It was proved that had the goods been sold in January, when the buyer had become bankrupt, the loss would have been considerably less. It was held, however, that the assignees could have demanded delivery according to the contract, which was not rescinded by the bankruptcy; that the seller was not bound to resell before the time for delivery, and that the damages had to be estimated according to the market price of the goods at the times fixed by the contract for delivery.

Benjamin remarks, in connection with this subject:

Although the buyer's insolvency does not *per se* put an end to the contract, yet if the buyer has given to the seller

such a notice of his insolvency as amounts to a declaration of his inability or unwillingness to pay for the goods, the seller is justified in treating the notice as a repudiation of the contract, and, after the lapse of a reasonable time to allow the buyer's trustee, and also, it would seem, a sub-buyer from the insolvent, to elect to complete the contract by paying the price in cash, the seller may, without tendering the goods to the trustee, consider the contract as broken, and prove against the insolvent's estate for the damages.

If the title to the property has passed to the buyer, or if under the contract the price is to be paid before title passes, the seller may bring an action for the price of the goods. This is the seller's only right if the goods have got into the possession of the buyer. The remedy is no longer against the goods, but there is a personal remedy against the buyer. The seller is on a footing with any other creditor of the buyer. In some cases, where the market value of the goods might be hard to ascertain, or where the market value could not be ascertained, probably a tender delivery and an action for the price in the case of refusal, would be upheld. In such a case the seller would act as bailee of the goods for the buyer. If the buyer wrongfully repudiates the contract, refuses to accept the goods, or returns them after delivery and refuses payment, he subjects himself to an action for such damages as the seller has sustained.

Where the actual damage sustained is not definitely ascertainable, the court will endeavor to allow such damages as are the natural and proximate result of the breach of contract, or which it may be considered were

within the contemplation of the parties when the sale was made. Thus it has been held, in awarding damages for breach of warranty as to the fitness of an engine for certain work, that a loss of additional profits which the plaintiff anticipated he would have made had the engine been available for his work, by reason of certain competing firms going out of business subsequent to the date of the contract of sale, will not be presumed to have been in the contemplation of the parties, and will not be allowed.<sup>1</sup>

It has also been held that the measure of damages for the unwarranted refusal of a vendor to carry out the terms of an agreement to sell a hotel property, includes the expenses to which the purchaser was put in endeavoring to induce the vendor to carry out his contract, or to refund the money paid on account of the purchase price; and the purchaser may be allowed his traveling expenses from his place of residence to the place where the property was situated in the same province.

Again, where a dredge was not delivered within the time specified in the contract of sale, the estimated net earnings thereof for the time delivery was delayed were awarded to the purchaser as damages. The damages will not include money paid by the purchaser as a bonus to insure the completion of scows, necessary for use with the dredge, before the date fixed for delivery of the dredge, as such loss was not within the con-

<sup>1</sup> Alabastine Co., Ltd., vs. Canada Producer & Gas Engine Co., Ltd., 8 D. L. R. 405.

temptation of the parties at the time the contract was entered into.<sup>1</sup>

16. *Remedies of the buyer.*—The buyer may have cause to complain of some breach of the contract. The seller may make default in delivery. The goods may have some defect. Possession may have been promised and refused. Some warranty of quality or title may be breached.

The buyer's remedy will depend upon whether or not the title to the goods had passed to him. If the title has passed to the buyer, he is, of course, the owner of the goods and may sue for delivery or may seize the goods in the hands of the seller or of some third person, in order to get possession. If the title has not passed, the buyer may bring an action for damages, if the seller wrongfully refuses delivery of the thing which he has agreed to sell. The damages which the buyer may recover in such a case will generally be the difference between the contract price and the market value of the goods at the time the contract is broken. In other words, the measure of damages is the profit which the buyer might have expected to make. Where, however, the seller knew when the contract was made that the buyer intended to make some special use of the goods, or expected some special profit upon the sale of them, the damages resulting from the breach of contract which the parties would reasonably contemplate, would be the damages which would result to the buyer from a breach of the contract under the special

<sup>1</sup> Brown vs. Hope, 17 B. C. R. 220.

circumstances known and communicated to the seller. If the seller knew of no special circumstances and had not been notified of them by the buyer, then he could not be held to have had in contemplation any special damage to be suffered by the buyer. Thus A sells B a refrigerator for his cold-storage plant, to be delivered in one month. When the contract is made, B informs A that the refrigerator is to be installed in a new plant, which must be ready at the end of the month in question for the transfer of meat and other perishables from the old plant, the lease of which has expired. The refusal or failure of A to deliver the refrigerator on the due date will entitle B to recover special damages, because it must have been in the contemplation of both parties when the contract was made, that if the refrigerator was not in position at the moment when it became necessary to transfer the perishables from the old to the new plant, B would suffer very special injury.

#### REVIEW

What are the principal obligations of the seller; of the purchaser? What is meant by delivery? Where does delivery take place and who bears the expense of it?

What is the rule about delivery to a carrier?

Discuss the time of delivery.

What may take the place of actual delivery?

Distinguish between express and implied warranty. What is implied warranty of title?

Name the remedies for breach of express warranty; for breach of implied warranty.

Upon what does the buyer's remedy depend?

## CHAPTER XII

### BAILMENTS

1. *Definitions.*—Bailment has been defined as a delivery of a thing by one person to another for a certain purpose, upon the promise that the bailee shall return the same thing to the bailor, or deliver it to someone in accordance with the bailor's instructions, after the purpose has been fulfilled.

The contract may be express or it may be implied. All kinds of movable or personal property may be the subject of a bailment. Altho the word is derived from a French word, meaning "to deliver," the delivery may be actual, constructive or by operation of law. It is not necessary that the bailor be the owner of the property; it sometimes happens that a bailee himself becomes a bailor as toward some new bailee. The new bailee is not regarded as the bailee of the true owner, and his obligations are toward his immediate bailor. Thus A finds an unregistered bond of the X Company, Limited, which has been lost by B. A borrows money from C, and puts up the bond as security. By operation of law, A is B's bailee, and, by actual delivery, C is A's. C could not refuse to return the bond to A when the debt was paid on the ground that A did not own it; but if C did make a delivery to B, he would be protected.

**2. *Distinctions.***—A bailment must be distinguished from a sale. A sale transfers the title or ownership of the thing sold. In the case of a bailment, only the possession of the thing changes. This distinction is unsatisfactory, as it is frequently difficult to say whether the title as well as the possession is transferred. It has been held, for instance, that when a farmer delivers wheat to a miller to be ground into flour, this is only a bailment, and the miller's creditors cannot seize the flour or the wheat.

The distinction between a bailment and a sale or barter is important when we consider that, in the case of a bailment, if the goods bailed are destroyed accidentally, the loss falls upon the bailor; in the case of a barter or exchange, as where A delivered to B certain oats for B's horses, the loss would fall upon B. A frequent instance of a bailment is the storage of grain in elevators. A number of owners may store their grain in the same elevator, the various deliveries being mixed together. The owner of the elevator is the common agent or bailee of them all. In such a case the owner of any part of the grain so stored may sell his interest in the undivided mass, and, as we have seen, a valid sale may be made of such an interest without dividing the portion from the bulk, the order on the warehouseman to deliver the quantity so sold, and the acceptance of this order by the warehouseman or elevator owner being sufficient.

Instead of being a bailment, however, the transaction may be a sale, when, for example, the warehouseman, by agreement with the various owners, is

entitled to sell any part of the grain stored with him, provided that he substitutes an equal quantity of similar grain of his own, or of other persons.

3. *Classification of bailments.*—Various classifications of bailments will be found in the different text books on the subject. The most practical classification for our purpose, however, may be set out as follows:

(a) Those which are for the sole benefit of either the bailor or bailee.

(b) Those which benefit both bailor and bailee.

Further classification may be made, viz.:

(1) Gratuitous bailments.

(2) Bailments for reward.

Class (a) or class (1) would include deposits, gratuitous loans for use, and mandates. Class (b) or class (2) would include what are called pledges and hirings.

A bailment may be in the nature of a deposit, as when A delivers a thing to B to be kept for him. A may lend goods to B to be used by him without charge. A may deliver goods to B to be used by him for hire. Again, A may deliver goods to B as a pawn, or as security for money borrowed: this is a pawn or pledge. A may deliver goods to B who is a carrier, or in order that B may do something to them or with them, and B is to be paid for his services. A, on the other hand, may deliver goods to B, to carry them or do something about them or with them, without any charge for his work or carriage. So if A, who is going away for the summer, delivers to B some valuable plants to be kept

and cared for by him, this is a bailment for the sole benefit of A, the bailor. It is a deposit. If A borrows B's automobile, this is a gratuitous loan for the sole benefit of A, the bailee. If A borrows one hundred dollars from B, and gives B as security for the loan five shares of stock, this is a bailment for the benefit of both parties, and is a pledge. If A hires a horse and carriage from B, and agrees to pay B two dollars, B gives A the use of his property for compensation, and this is a bailment in the nature of a hiring. If A stores his household furniture with B at ten dollars a month, this also is a bailment, and for the benefit of both parties. A gives B a trunk to take to C, and agrees to pay B one dollar. This is a bailment in the nature of a contract for carriage for hire.

4. *Extraordinary bailment*.—When goods are entrusted by a guest in a hotel to the care of the proprietor, and when goods are delivered to a common carrier for transportation, the liability of the hotel proprietor and of the carrier as bailees is greater than that imposed upon the ordinary bailee. These will be considered more particularly later.

5. *Contract of bailment*.—The persons capable of making a contract of bailment are those who have the usual capacity to contract. Thus an infant could not be a party to a bailment, unless it is a necessity.

If the contract is not in express terms, an implied contract will be sought in the presumed intention of the parties as disclosed by their acts and deeds, and

by the surrounding circumstances. Thus, it may be clear from the surrounding circumstances that a given bailment is not gratuitous, but was entered into by the bailee in the expectation of a reward.

6. *Use and care of bailed property.*—By law, a bailee must give reasonable care to the thing entrusted to him. When there is an express contract, however, which defines the use and care which the bailee is to make or give, he will be bound strictly by the contract. If he fails in this respect and causes loss or damage, he will be liable in an action for damages for breach of contract. If he goes further, and acts as tho he owned the thing entrusted to him, he may be guilty of conversion.

7. *Obligations of bailor in a bailment for his sole benefit.*—The bailor, when the bailment has been made for his sole benefit, must recoup the bailee for what he may have spent in the preservation of the thing, the expense so incurred being regarded as an extraordinary and necessary expense, urgent in its nature. The bailor must also notify the bailee of any defect in the thing which may cause injury. He must notify the bailee of unapparent risks. Thus, if A requests B to take care of a parcel for him, and B accidentally drops it and the contents of the parcel explode, A will be liable for damages, unless he notified B of the dangerous qualities of the contents of the parcel; and if B undertakes to care for A's horse for a month while A is away and to charge nothing for his trouble, B will be entitled to reimbursement

for the extraordinary expense which he may be put to if the horse becomes ill and a veterinary surgeon has to be called in.

8. *Obligations of bailee in a bailment for the sole benefit of the bailor.*—We will suppose that A has gratuitously undertaken to keep certain goods entrusted to him by B. A must exercise reasonable care and diligence in keeping the goods. By reasonable care and diligence is meant such care and diligence as a person would ordinarily use in connection with his own property, and such skill as he is possessed of. In other words, he is bound to take such care as a reasonable, prudent and careful man might fairly be expected to take of his own property. Generally speaking, the bailee will not be answerable except for gross negligence, unless he is in bad faith.

Gross negligence might consist in the failure to exercise reasonable care, skill and diligence, or in the absence of ordinary care, or in the failure to perform an undertaken duty. If B allows A to place an automobile in his stable for the winter, B will not be responsible if A has left water in the cooling apparatus, which freezes and cracks part of the machinery; but B must not use the automobile, as to do so would be contrary to the spirit of the bailment, and if he used it and damage resulted he would be responsible. B would be liable for gross negligence if he were to leave the automobile outside the stable overnight and it were stolen.

The bailor must return the thing, with any profit

or increase derived from it. Thus if B agrees to care for and pasture A's cow, and during the period of the bailment a calf is born, B must hand back at the expiration of the bailment both the cow and the calf.

9. *Bailment for the sole benefit of the bailee.*—We will suppose that the bailee is a person who has borrowed an automobile. In this case the bailee will be held to exercise greater care than in other cases of bailment. As we have seen, if the bailment is for the sole benefit of the bailor, the bailee is held only for reasonable care and diligence. In the present case, however, he must exercise great care. Great care would be that care which a very cautious and vigilant man would take of his own property. The borrower in such a case will be liable for the least neglect. Thus, if B borrows A's automobile, and upon going to his garage B finds that there is not room for it, B will be bound to remove his own automobile to make room for A's, unless he can store A's automobile in some other place.

10. *Termination of bailment for sole benefit of one party.*—The general rule is that when a bailment is made for the benefit of one party only, it may be terminated by either at any time.

The bailment may be determined or ended if the bailee, the depository in the case we are considering, acts inconsistently with the terms of the bailment.

It is said that when a bailment is made for the sole benefit of the bailor, it is terminated by the death or insanity of either party. The same rule would apply

when the bailment was made for the sole benefit of the bailee, except that if the bailment had been made for a definite period, the death or insanity of the bailor would not interrupt the bailment until the period fixed had elapsed.

11. *Creation of a pledge or pawn.*—A pledge is a contract by which a thing is placed in the hands of a creditor, or being already in his possession, is retained by him with the owner's consent as security for his debt. The words pledge and pawn are synonymous, tho pledge includes pawn which is generally used in a particular sense. A pawnbroker is a pledgee, but the word pawnbroker is usually used to describe a person who carries on the trade of pawnbroking. The word pledge is frequently applied to the article which is pledged. When the customer of a bank hands over securities to the bank to guarantee a loan, the pledge is known as collateral security.

It has been held that the relation of pledgor and pledgee arises between a broker and his customer when the former buys stock for the latter, and the latter puts up margin which he agrees to keep good. The same relation does not arise between a commission merchant and his customer for whom he buys grain for future delivery on margin, which the customer promises to keep good up to the time of delivery. In the former case the stocks are actually bought by the broker, but in the second case the merchant has a mere executory contract of sale. In an ordinary stock transaction on margin, the broker buys the stock

outright; if he does not do so it is a bucket-shop transaction.

**12. Construction and operation of pledge.**—It is clear from the definition already given that a pledge is a delivery of goods to a creditor as security for his debt. The right to the property vests in the creditor only in so far as it is necessary to secure the debt. The general property remains in the pledgor; the special property is in the pledgee until the debt is paid. The pledge, therefore, is a privilege or lien over the goods pledged for the payment of the debt, together with interest and reasonable expenses incurred in caring for the goods pledged. The lien or privilege subsists only while the thing pledged remains in the hands of the creditor or person appointed by the parties to hold it, unless it is otherwise agreed, when the particular debt is paid which the pledge was given to secure, that the creditor can retain it to secure some other debt. Naturally, the pledgor warrants that he has a title to the thing pledged, otherwise the security would be illusory.

**13. Rights and duties of the bailor.**—The person who rents goods and chattels is presumed to warrant his title and peaceable possession. He must furnish things which are reasonably fit and proper for the purpose intended. Generally speaking, he is an insurer against all defects or against such defects as can be guarded against by reasonable care and skill. Thus, if A rents a carriage and it breaks down on the journey, he is liable and not the person who is using

it. He is supposed to have rented a carriage fit and proper for the journey.

The bailor is bound to exercise vigilance and care to discover defects in the thing rented, and if defects exist, should notify the bailee of any danger or risk unapparent to the bailee. Thus, in an Ontario case, in which a person rented a portable engine and boiler to another, which exploded as soon as it was first used, and while it was in charge of a competent engineer, it was held that, as the lessor of the chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff (the lessor, who sued for the value of the engine and boiler), in the absence of negligence on the part of the defendant, could not recover.

**14. *Rights and duties of bailee.***—We have already seen that the bailee must take such reasonable care of the property of his bailor in his possession as a prudent man would of his own property. If A sends his horse to B to be kept at B's stable, and, the stable not being locked at night, the horse is stolen, B will not be excused because he shows that he did not lock the stable while his own horses were therein. It could not be said that, in leaving the stable door unlocked, even tho his own horses were inside, he was acting as a prudent man would in the care of his own property.

If the bailment of the thing is made for a special purpose, we have also seen that the bailee must use the thing for that special purpose, and he is liable for loss or damage arising during or because of any other use

or employment of the thing. Thus, it has been held, that when a person hires from another a horse and wagon with seats for two persons, and he places three seats therein, and the horse during the journey sickens and dies, he will be liable for the misuser; or when B hires a horse to drive to the county fair, but instead drives to market, where the horse is accidentally killed, B is liable for the value of the horse.

The bailee or lessee is not ordinarily responsible when the thing leased is destroyed by fire without his fault. Thus, when goods are leased, under a covenant by the lessee to restore them to the lessor at the expiration of the term in as good order as they then were, reasonable wear only excepted, and the goods during the term were destroyed by fire without the lessee's fault, it was held that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term.

**15. Warehousemen and wharfingers.**—A warehouse is a storehouse for goods. A warehouseman is a bailee who owns or keeps a warehouse in which he keeps goods in storage for hire. A wharfinger is one who owns or keeps a wharf for the purpose of receiving goods for a compensation. The contract between the bailor and the warehouseman is generally evidenced by a warehouse receipt which is handed to the bailor. Such a receipt may be of prime importance if a doubt arises whether there has been a sale or a

bailment. In its absence, or if it is ambiguous, the circumstances surrounding the transaction will be carefully examined. Thus, it was held in an Ontario case in which wheat was left with a warehouseman by a farmer (the owner), and the sale price was to be thereafter fixed, the fact that the risk of fire was to be borne by the farmer and the wheat to be kept in a separate bin, was strong evidence that no sale was effected.<sup>1</sup>

In a Manitoba case it was held that, when wheat is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they cannot be returned, and the *well-understood course of the business* is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract is really one of sale and not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods, or has an option to do either, as the property in the goods has passed to the warehouseman.<sup>2</sup> But ordinarily, when the grain of different owners is stored and mixed in one bin, each bailor becomes an owner in common of his share of the whole. The elevator owner is then bound to keep in his bins sufficient grain to enable him to make delivery of the share of each bailor. Otherwise he may be held for conversion.

<sup>1</sup> Isaac vs. Andrews, 28 U. C. C. P. 40.

<sup>2</sup> Lawlor vs. Nicol, 12 Man. Reps. 224.

Warehouse receipts are negotiable in that they are transferable by indorsement and delivery and carry to the transferee the title in the goods covered by them. The Bank Act defines "warehouse receipt" as follows:<sup>1</sup>

#### WAREHOUSE RECEIPT

(1) Means any receipt given by any person for any goods, wares or merchandise in his actual, visible and continued possession as bailee thereof in good faith and not as of his own property, and

(2) Includes receipts, given by any person who is the owner or keeper of a harbor, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods . . . , for goods . . . delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him, whether such person is engaged in other business or not, and

(3) Includes also receipts given by any person in charge of logs or timber in transit from timber limits or other lands to the place of such logs or timber.

Clause (3) was enacted because it had been held in several cases that a "warehouse receipt" for logs lying in certain lakes on the way from the woods to the mill was not valid, as the logs were not in a place kept by the signers of the receipt. The receipt need not be in any particular form, but the receipt and the facts surrounding its issue should conform to and be brought within the definition. The owner's name should be given, a sufficient description of the goods, the place where the goods are stored or kept, and, in the

<sup>1</sup> Section 2 (g).

case of logs in transit, the place of departure and of destination.

A warehouseman is bound to use reasonable care and diligence in caring for the things deposited with him. He is not an insurer, like a carrier, against all risks. But, as he holds himself out to care for things left in his charge, it follows that his care must, unless otherwise agreed, be adequate. Thus, the owner of a refrigerator storage warehouse must maintain a temperature in his warehouse suitable for the preservation of perishables entrusted to him. The warehouseman must, for instance, use all reasonable and modern means for preserving his customers' goods from theft, fire, water, heat and rats.

A warehouseman has for payment of his charges a specific lien on the goods stored with him.

#### REVIEW

How would you distinguish bailment from sale and from barter?

Classify bailments.

Explain the contract of bailment.

What are the obligations of the bailee in a bailment for the sole benefit of the bailor?

What is a pledge? How does the relation between pledgor and pledgee arise? What does a pledge cover?

What are the rights and duties of the bailor? Of the bailee?

Define warehouse receipt.

## PART III: NEGOTIABLE CONTRACTS

### CHAPTER XIII

#### NEGOTIABLE INSTRUMENTS IN GENERAL

1. *Introductory.*—Bills, notes and checks are negotiable instruments—that is, they are instruments or contracts, the legal right to which is transferable from one person to another by delivery of the instrument itself. A check, for instance, is transferable by delivery when it is payable to bearer; by indorsement and delivery, when it is payable to order. Bills, notes and checks are, as the case may be, unconditional promises or orders by one person to another to pay money, at a given or ascertainable time. They are then, not only a substitute for money, but evidences of indebtedness. Bonds are negotiable instruments. Bills of exchange, promissory notes, checks and bonds, are classed together as the typical negotiable instruments.

Certain other instruments, tho often so called, are not, in the fullest sense, negotiable. Among these are bills of lading, dock warrants, warehouse receipts and certain certificates of stock. They are salable and can pass from hand to hand, and are thus quasi-nego-

tiable, but are not true negotiable instruments. They are documents of title.

Speaking of these quasi-negotiable instruments, the Honorable Mr. Justice Maclaren says:

In England, warehouse receipts were not fully recognized as negotiable instruments, like bills of lading and other documents of title, until the Factors' Act, 1877. They are negotiable only in the lower or secondary sense of the term in that they may be transferred by indorsement and delivery, or by delivery alone, and may thereby vest in the transferee the rights of the transferor. They are not negotiable in the higher sense, like bills of exchange and promissory notes, which by indorsement or delivery before maturity may vest in the bona fide holder for value not only the rights of the transferer, but the right to claim the full amount for which the instrument is drawn. If the receipt is in favor of a certain person or his order, it must be indorsed by him; if it is drawn in favor of the bearer or indorsed in blank, it is transferable by delivery alone. . . . The bill of lading is a very ancient document, and by the custom of merchants is negotiable, when made to bearer or order or to assigns.

2. *Negotiability.*—When a negotiable instrument is actually negotiated—i.e., transferred for value to a person without notice of any defect in it—the transferee has an absolute right to collect from the persons liable upon the instrument as maker, indorser or acceptor. But if A has bought a horse from B and has contracted to pay B one hundred dollars, B can assign or transfer his claim against A to C. If C sues A, the latter can raise against him any defence that he might have raised against B—e.g., that he had been defrauded, that the money was to have been paid only after he had used the horse for a month, and so on.

In effect, C has no better rights against A than B. He has bought B's rights for what they are worth.

3. *Presumption of consideration.*—A negotiable instrument is always presumed to have been given or negotiated for value. And when value has, at any time, been given for a bill, the holder is deemed to be a holder for value, and entitled to collect as against any previous acceptor or any parties who became parties to the bill before value was given. In the case of an ordinary contract, the debtor may show by way of defence that there was no valid consideration to support the contract upon which it is attempted to hold him. In other words, if A gives B the following—"On demand I promise to pay to B \$25. A"—the debt so incurred by A is non-negotiable, because the words "or order" are not added after "to pay to B." B, if he sues A, must prove consideration received by A. But if A gives B a note—"Thirty days after date I promise to pay \$25 to the order of B"—and B discounts the note at a bank, or indorses it and hands it to C in payment of a shipment of goods, the bank or C, as the case may be, can collect from A. A can raise no defence. If B had held the note until after maturity and had then sued A, B would not have had to prove consideration received by A. The burden of alleging and proving lack of consideration would be on A.

4. *Days of grace.*—When a bill is not payable on demand, three days of grace are added to the time of payment as fixed by the bill and, unless otherwise

provided, the bill is due and payable on the last day of grace.<sup>1</sup>

5. *Bills of Exchange Act.*—Our present Bills of Exchange Act is a revision or consolidation of the Act of 1890 and its amendments. Before that time the laws governing bills and notes varied in the different provinces. In Quebec, a mixture of French and English commercial law was enforced. In the other provinces, the English law as it existed when introduced into the particular province and, as amended by local statute, was applied. There were anomalies and contradictions, and it became evident that, in a matter of such vital importance to our commerce, there should be a uniform law for the whole of Canada. The English law respecting bills and notes had been codified in 1882, and our Act of 1890 was largely copied therefrom.

In the United States, where formerly there existed conflicts between the laws of the different states governing the subject of bills and notes, a Negotiable Instrument Law has been adopted in most states. This law is, in the main, in agreement with the English and Canadian acts.

6. *Promissory notes.*—Too careful attention cannot be given to the definitions of the various negotiable instruments.

A promissory note is an unconditional promise in

<sup>1</sup> Provided that whenever the last day of grace falls on a legal holiday or non-juridical day in the province where the bill is payable, then, the day next following, not being a legal holiday or non-juridical day in such province, shall be the last day of grace.

writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

A note need not be in any particular form of words, so long as the conditions just mentioned as being necessary to its existence are present. The promise must be unconditional, hence a document reading, "I promise to pay, on demand, to A. B. \$50, if I can sell my B. C. Company stock," is not a valid note. Similarly, as it contained a condition, the following instrument was declared invalid—"Four months after date I promise to pay to W. H. or order, \$1,264, value received. This note to be held as collateral security."

A "sum certain in money" must be promised. A promise to pay out of a particular fund is not a promissory note. The fund may prove inadequate or may never exist. Hence a promise to pay out of the net proceeds of the sale of a cargo is not a promissory note, because it is not negotiable. Yet the instrument will serve as an evidence of the debt and as an assignment of the sum mentioned.

The note is to be "signed by the maker"—which means that the maker may sign, or someone under his authority may sign for him. A corporation signs thru its authorized officers. Only the person who signs is liable; and so a person whose signature is forged is not bound. But when an agent signs for a principal he must be careful to sign so as to avoid

personal liability. He must not sign "John Smith, agent for J. A. McDonald," but J. A. McDonald, Per John Smith, or the Estate Company, Limited, Per John Smith, President.

Thus, when at the left side of a note the words, "The Estate Company, Limited," were printed, and the note was signed "John Smith, President," "James Thompson, Treasurer," Smith and Thompson were held personally liable. To bind the company and not the officers the note should have been signed:

The Estate Company, Limited,  
Countersigned by Per John Smith, President.  
James Thompson  
As Treasurer.

But the mere signature is not enough; to become a note the instrument must be delivered; or, if payable to the maker himself, must be indorsed by him. A note is payable on demand which is expressed to be so payable, or in which no time for payment is expressed. Generally the place at which the note is payable is mentioned, and whether or not the note is to bear interest. If interest is stipulated, it will run from the date of the note; if not, then only from its maturity. If the rate is not fixed, only the legal rate of five per cent can be charged.

*7. Bills of exchange.*—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand

or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person, or to bearer.

The remarks just made concerning promissory notes are generally applicable to bills of exchange. A bill of exchange is an order, and is in its nature the demand of a right, not the mere asking of a favor, and therefore a supplication made or authority given to pay an amount is not a bill.<sup>1</sup> The person addressed is "required" to pay the sum named. But mere terms of courtesy will not render the bill invalid. Hence it has been held that an order, as follows, "Mr. Nelson will much oblige Mr. Webb by paying J. Ruff, or order, twenty guineas on his account," was held a good bill; as also the following, "Please let the bearer have \$50. I will arrange it with you this forenoon. Yours truly." But the following were held to be bad: "Please to send \$10 by bearer, as I am so ill I cannot wait upon you"; or, "To E. & S.—We hereby authorize you to pay on our account to the order of G., \$600. de W. & S." All of these examples are informal, and it is difficult often to reconcile the judgments declaring similar informal orders good or bad. It is wise, of course, to avoid informality in business matters, and to follow closely the accepted form of contract. A correct and simple form of bill of exchange may be here set out:

\$500 MONTREAL, QUE., September 10, 1913.

On demand, pay to the order of A. MacNaughton and Com-

<sup>1</sup> Daniel, Sec. 35.

pany, Five Hundred. . . . . Dollars, value received,  
and charge to the account of

BALFOUR & COMPANY.

To W. L. BOOKER,  
Toronto, Ont.

A bill of exchange is commonly called a draft, and after it has been accepted by the person to whom it is addressed, an acceptance. In the above model bill of exchange or draft, Balfour and Company is the *drawer*, because it draws on W. L. Booker. A. MacNaughton and Company, Limited, in whose favor the draft is made, is called the *payee*, for payment is to be made to it, or to any one to whom it may negotiate the bill. Booker, against whom the draft is drawn, is called the *drawee*. If Booker accepts the draft, he writes across the draft the word "accepted," with the date, and frequently the bank at which it is payable, and signs his name.

The instrument must be in writing, and *writing* "includes words printed, painted, engraved, lithographed, or otherwise traced or copied."<sup>1</sup> The writing may be in pencil or in ink. If there is a conflict between the printed and the written words, those written will prevail.

As testimony (that is, parol testimony) cannot in any case be received to contradict or vary the items of a valid written instrument, the contract of the parties to notes or bills, as it appears upon the face of the instrument, cannot be varied by parol evidence. Hence, in an action upon a bill or note, the defendant

<sup>1</sup> Interpretation Act, R. S. C. Ch. 1, S. 34 (31).

will not be allowed to prove that, at the making of the instrument, it was verbally agreed that it should be renewed or not paid at maturity; or that the instrument expressed to be payable at a certain time should be payable only in a given event; or that it should be payable in instalments, or in any other manner than as expressed in the instrument. But it has been held that parol evidence is admissible to show that the date of the bill or note is not the true date, and to show the true date; or that the delivery of the instrument is incomplete and conditional only, so that the contract is not operative; or that the contract has been discharged by payment, release or otherwise.

The definition requires that the bill shall be addressed by one person to another. "Person" includes any body corporate, or its representatives, and the heirs, executors, administrators or other legal representatives of such person. The drawee need not be named, if he is described with reasonable certainty so that the bill can be duly presented.

The instrument is not a bill of exchange until it is signed by the drawer, tho he may sign a blank paper which is later filled up, or he may sign it after it has been accepted.

A bill is payable on demand, (a) which is expressed to be payable on demand or on presentation, or (b) in which no time for payment is expressed. A bill is payable at a determinable future time when it is expressed to be payable (a) at sight, or at a fixed period after the occurrence of a specified event which is cer-

tain to happen, tho the time of happening is uncertain. Thus, "six weeks after the death of my father, I promise to pay, etc."; "one year after my death"; "on demand after my decease." Similarly, a promissory note, made payable upon the coming of age of a minor, naming the date, is a good note.

Bills of exchange are either *inland* bills or *foreign* bills. An inland bill is one which is, or on the face of it purports to be, (a) both drawn and payable within Canada, or (b) drawn within Canada upon some person resident therein. Hence the following are inland bills:<sup>1</sup>

- (a) A bill drawn in Canada upon some person resident there and payable in Canada.
- (b) A bill drawn in Canada upon some person abroad, but payable in Canada.
- (c) A bill drawn in Canada upon some person resident there, but payable abroad.
- (d) A bill which on its face purports to come within any of the foregoing classes, but which was actually drawn abroad, tho dated in Canada.

All other bills are foreign bills. The distinction may be of importance, because a foreign bill must, in Canada, be always protested if dishonored by non-acceptance or non-payment. An inland bill, except in the Province of Quebec, need not be protested. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.<sup>2</sup> In the United

<sup>1</sup> Maclarens, "Bills and Notes," 1909, p. 84.

<sup>2</sup> Bills of Exchange Act, Sect. 25 (3).

States, bills drawn in one state and payable in another are foreign bills.

8. *Bills in a set*.—Bills in a set were devised to overcome the delay and uncertainty common enough before the day of trains and steamships, when mails were carried in sailing ships. If the ship was lost, a long delay, perhaps of months, might ensue before the loss could be verified and a new bill of exchange dispatched. So it became the practice to issue bills in a set of three or four parts. After the first of exchange is mailed, a second of exchange may be forwarded by the next mail. If the first has been lost, the second may be used. If the first arrives and is paid, the second is returned. Where each part is numbered and contains a reference to the other parts, the whole of the parts constitutes one bill. Each bill of the set contains a condition that it shall be payable only if all the other parts remain unpaid. The following is an example of a "First of Exchange":

MONTREAL, QUEBEC, September 10, 1913.  
Exchange for £200. Stg.

At sight of this First of Exchange (Second and Third unpaid) pay to the order of A. B. & Co., two hundred pounds sterling. Value received.

B. C.

To the Bank of Montreal,  
London, England.

9. *Checks*.—A check is a bill of exchange drawn on a bank, payable on demand. Hence it is an unconditional order in writing addressed to a bank by the person drawing or signing it, requiring the bank

to pay on demand a sum certain in money to, or to the order of, a specified person, or to bearer.<sup>1</sup>

If the drawee of a check is a bank, it should not be addressed to the cashier, manager or agent of the bank, but to the bank itself. Otherwise the bank might be held not liable upon it if accepted or certified. As a check is supposed to be payable on demand, in the absence of other directions, the words "on demand" need not be on the check. It is not invalid if not dated, or if antedated or post-dated, or if dated on a Sunday or other non-juridical day. Nor is it the less valid if the place where it is drawn is not mentioned. When a person gives a post-dated check, he impliedly undertakes that on the day mentioned he will have funds in the drawee bank sufficient to pay the check. But if he obtains goods by giving a check on a bank where he has no account, and does not intend to have an account, he is guilty of the crime of obtaining money by false pretence, and, if convicted, may be sentenced to three years' imprisonment.

As checks are bills of exchange drawn on a bank, they are subject to the same general rules as demand bills. A bill of exchange must be presented for payment at the time fixed for payment—on demand, or at sight, or so many days after sight—or within a reasonable delay thereafter, or the drawer and the indorsers are wholly discharged. In determining what is a reasonable delay, the act holds that regard should be had to the nature of the bill, the usage of trade with

<sup>1</sup> See the definition of a bill of exchange.

regard to similar bills, and the facts of the particular case. But failure to present a check within a reasonable time discharges the drawer only to the extent to which he actually suffers damage by the delay. A check should be presented for payment, where the holder and the bank are in the same place, before the banks close on the next business day following the day of its issue. If they are in different places, the check should be deposited for collection by the day after its receipt.

The act is careful to explain what is meant by the discharge of the drawer to the extent of the actual damage suffered. If the drawer handed B a check for one hundred dollars on a bank where he had funds sufficient to pay, but B neglects to present the check for three months, and meanwhile the bank fails and pays ten cents on the dollar, the drawer would be discharged to the extent of ninety dollars. Of course if B could show that he used diligence and that the delay was not unreasonable, he would not lose his recourse against the drawer. But it has been held that where it was understood that a bank was likely to suspend payment, a delay of one day in presenting a check was unreasonable. Delay in making presentment for payment of a bill of exchange is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. And this applies as well to checks.

If the holder presents the check for acceptance, and has it accepted or certified without taking payment, the maker and indorsers are discharged, and if the bank fails before the check is paid, the holder has no other recourse.

**10. *Acceptance or certifying of checks.***—The duty and authority of a bank to pay a check drawn on it by its customer are terminated by countermand of payment or by notice of the customer's death. Otherwise, when a bank has funds of the drawer sufficient to pay a check, it is bound to pay it or be liable in damages since the holder may be caused damage and inconvenience or the drawer's business reputation be impaired. But after the holder of a check has had it certified or accepted, the drawer can no longer stop payment of it. By getting the check certified or marked, the holder provides against any possibility of the drawer stopping payment or withdrawing from his account enough money to make payment of the check impossible. Upon acceptance, the bank becomes liable to the holder: it virtually sets aside, in its books, the amount of the check out of the drawer's account, and the accepted check in the hands of the holder is the equivalent of a deposit receipt payable to the holder. The drawer and any indorser are discharged, because the holder has a new debtor, the bank. He accepts the promise of the bank to pay, instead of that of the drawer, and not in addition to it.

A distinction is made where the drawer before

issuing a check has it certified. Maclaren says that in this case the bank is in the position of an ordinary acceptor, its credit being added to that of the drawer; whereas, if the holder has the check certified, the bank becomes the sole debtor. And where the drawer has had his check certified, but does not issue it, or where he later becomes the holder, the certificate may be cancelled and the entry reversed, at his request, or by simply depositing the check to his account.

11. *To whom payable.*—Negotiable instruments, from their nature, must be so payable that they are negotiable. They must, therefore, be either payable to bearer and thus pass by delivery from hand to hand, or be payable to the order of some one who by indorsement and delivery negotiates them. Where the payee of a negotiable instrument is a fictitious or non-existent person, it is payable to bearer. Fictitious names in frequent use are "cash," "expense account," "labor." A bill payable to "John Jones or bearer," is a bill payable to bearer. If the bill is payable to order, the payee must be a specified person, but it is not payable to order if it contains words prohibiting transfer, or indicating an intention that it should not be transferable. By "specified person" is meant that he should be so indicated as to be clearly identified. Thus the payee may be "John Smith," or "the executors of the Estate A.," or the "Secretary of the Province of Quebec." The payee may be the same person as the maker or drawer, but the instrument is not is-

sued until such maker or drawer has indorsed and delivered it. If the name of the payee is wrongly spelled, or where he is described by his office, he may be identified by parol evidence; but where the payee is not named or is not even described, parol evidence is inadmissible to identify him. If the name of a payee or indorsee is wrongly spelled, he may indorse in the same way and add his proper signature, or may indorse by his own proper signature. Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. If a payee indorses in blank, that is, merely signs his name without adding words indicating that he indorses to a particular indorsee, the instrument thereby becomes at once payable to bearer. If the payee's name is left in blank, a legal holder of the bill may fill the blank with any name he chooses.

12. *Certainty of drawee.*—The drawee of a bill of exchange must be clearly indicated. An instrument regular in form, except that it is not addressed to any drawee, is not a bill of exchange. As in the case of the payee, however, the drawee need not be named, but may be described with such certainty that the bill can be presented to the person intended. Thus, "To our agent in London" is sufficient, but "To . . . . ., London, England," is not. Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having

capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

**13. Blanks.**—The general rule is that, *prima facie*, a person in possession of an instrument which in some particular is incomplete, has authority to complete it by filling the blanks. We have already seen that the legal holder of an instrument from which the payee's name has been omitted may insert a payee. Similarly, where a bill expressed to be payable at a fixed date is issued undated, or where the acceptance of a bill payable at sight, or at a fixed period after sight, is undated, any holder may insert the true date of issue or acceptance. But if the holder, in good faith, inserts a wrong date, or in any case if a wrong date is inserted, a subsequent holder in due course is not prejudiced.<sup>1</sup> He is entitled to take the bill as he finds it. Or where a simple signature on a blank paper is *delivered* by the signer *in order that it may be converted into a bill*, it operates as a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an indorser.

But where a signature was obtained ostensibly for a receipt, and a note was written over it, the signer

<sup>1</sup> A holder in due course is one who has taken a bill, complete and regular on the face of it, provided he became the holder of it before it was overdue and without notice that it had previously been dishonored, and that he took it in good faith and for value, and that at the time it was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

was not liable.<sup>1</sup> In that case the signature was not delivered in order that it should be converted into a bill. But where a note was signed in blank, and was sent with instructions to be filled up for one hundred and fifteen dollars, and it was filled up for four hundred and sixty-one dollars, the maker was held liable for the full amount to a holder in due course. On the other hand, where a blank acceptance was stolen from the signer's desk and filled out, he was not held liable to a holder in due course—he had not delivered the acceptance or in any way lent his signature or authority. And so, also, where a bill is wanting in a material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. So where the maker of a note delivered it with the amount in blank, and it was fraudulently filled out for eight hundred and fifty-five dollars, he was held liable to an innocent indorsee. And where a bill is drawn payable to. . . . . or order, any holder for value may write his own name in the blank and sue on the bill. Tho an alteration is not a filling-up, it has been held that where a person indorsed as payee a note for five hundred dollars, on which there was a blank space to the left of the word "five," which the maker fraudulently filled out with the word "twenty," the indorser was liable for two thousand five hundred dollars to an innocent indorsee. The reason for this decision will now appear.

**14. Alteration of bill.**—The general rule is that

<sup>1</sup> *Banque Jacques Cartier vs. Lescard*, 13 Que. L. R. 39 (1886).

where a bill or acceptance or a note is materially altered, without the assent of all parties liable thereon, it is voided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. This rule makes clear the reason for the holding just above mentioned. A subsequent indorser is in the position of having lent his name and credit to the instrument. With these exceptions, the bill or note is void if materially altered, provided, however, that where there has been a material alteration which is not apparent, a holder in due course may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor.

The first part of our general rule makes a bill void if materially altered, with the exceptions mentioned. This was considered to be a hardship, and so the proviso was added to protect holders in due course who may sue upon the bill according to its original tenor. That is, if A makes a note for five hundred dollars and B fraudulently raises the amount to two thousand five hundred dollars and negotiates it to C who is a holder in due course, C can sue A for the five hundred dollars according to the original tenor of the note.

Two notes were given for patent rights, and the maker indorsed on them the words "the within notes not to be sold." The payee cut from one note the portion containing these words, but without defacing it. On the other he erased the word "not." The

plaintiff noticed the erasure when buying the notes, and gave much less than their value for them. It was held that he was not an innocent holder, and the notes were void.<sup>1</sup>

A genuine check for six dollars was altered to one thousand dollars so skilfully as to escape detection, and deposited in another bank by the pretended payee. twenty-five dollars being paid him at the time, and eight hundred dollars more after collection from the drawee bank. At the end of the month the forgery was discovered. It was held that the drawee was entitled to recover from the collecting bank.<sup>2</sup>

### REVIEW

Define negotiable instruments and name some instruments that are not in the fullest sense negotiable.

What consideration is a negotiable instrument presumed to have? Explain, with examples.

What is a promissory note? Who must sign it? Is delivery necessary? How is interest provided for?

Define bill of exchange. Who is the drawer? The payee? What can parol evidence determine? What distinguishes an inland bill from a foreign bill?

What is a check? Who is the drawee? What rules apply to checks?

What is certification? What happens when the holder of the check has it certified?

What is the general rule concerning blanks on an instrument? What is a holder in due course?

<sup>1</sup> *Swaisland vs. Davidson*, 3 O. R. 320 (1882).

<sup>2</sup> *Dominion Bank vs. Union Bank*, 40 Can. S. C. R. 366 (1908).

## CHAPTER XIV

### TRANSFER AND NEGOTIATION

1. *Methods of transfer.*—In the preceding chapter we have examined the definitions of our subject, and have obtained some idea of the form and contents of bills, notes and checks, and of the inception of negotiable contracts. To be of use, these instruments must circulate, and their circulation is governed by rules which must now be dealt with. They circulate by transfer, or passing from hand to hand by assignment, by operation of law and by negotiation.

2. *By assignment.*—A check or a bill of exchange does not operate as an assignment of funds in the hands of the drawee available for payment. Hence, the drawee of a bill of exchange who does not accept it is not liable on the instrument. Similarly, a check which is a bill of exchange on a banker, unless it is certified, gives the holder no right against the bank to claim or enforce payment. We have seen that an order which is not unconditional, in that it calls for payment out of some particular fund, is not a bill of exchange, but may, under a provincial law, operate as an assignment of the amount in question to him in whose favor the instrument is drawn. A bill or a note

may be transferred, as for example, to a purchaser or a pledgee, without being indorsed by the holder. The holder thus assigns it. The transfer gives the transferee such title as the transferor had in the bill and no more, but the transferee can also demand the indorsement of the transferor. The transferee is in no better position and has not a better title than the transferor. By receiving and giving value for it, even before maturity, and before indorsement, he does not become a holder in due course. "He holds the bill subject to any defect of title in the transferor, of which he becomes aware before the indorsement of the bill to him, and if it is not indorsed before maturity, it is subject to any defects of title that existed in the transferor." A simple form of assignment takes place under the following circumstances: A holds a note of B for five hundred dollars. He entrusts it to C. Later he writes to C, telling him to keep the note in payment of his indebtedness to him (C). The note is thus assigned to C, who, nevertheless, can demand A's indorsement, not in order to hold A, but in order to sue B. The point to observe is that the note has not been transferred by *negotiation*.

**3. By operation of law.**—From the preceding paragraph it will be understood that negotiable instruments may be treated as personal property, transferable by voluntary assignment. They may also be transferred by operation of law. When a testator holds a note, for instance, it passes to his executor to

be dealt with according to the provincial law. When a person dies without a will—intestate—bills or notes in his possession pass to the administrator of his personal estate, or to the heirs, as in Quebec. Similarly, if a person becomes insolvent, and in his estate are found bills and notes, these pass to the assignee, curator or trustee to be collected or dealt with as he may be authorized by the provincial law. On the death of a joint payee or indorsee, the title vests immediately in the survivor. And when transfer by operation of law occurs, the transferee takes the place of the transferor, just as in the case of an assignment.

4. *By negotiation.*—As to what is a negotiable instrument, it may be well to cite the words of a great authority:

It may therefore be laid down as a safe rule, that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a bona fide transferee for value.<sup>1</sup>

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word.<sup>2</sup>

Now a bill or note is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. A holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. He

<sup>1</sup> See *Crouch vs. Credit Foncier*, L. R. 8 Q. B. (1873), at p. 381.

<sup>2</sup> *Ibid.*

need not be the legal owner. But if he is in possession and may legally recover from the person liable thereon, he is a holder, whether he be the owner or a holder for discount or a holder for collection.

As we have seen, a bill or note is negotiable when it is payable to bearer or to a particular person or to order. If payable to bearer, it is negotiated by delivery;<sup>1</sup> a bill payable to order is negotiated by the indorsement of the holder completed by delivery. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. If the holder of a bill or note payable to his order dies, his rights pass, as we have seen, to his executors or personal representatives, who in turn, may negotiate the instrument by indorsement thereof. The same would be true of a bill made payable to a dead man by someone not aware of his death.

When a bill or note is negotiable in its origin it continues to be negotiable, until it has been restrictively indorsed or has been discharged by payment or otherwise.<sup>2</sup> And a bill or a note negotiable in its origin is one which is made payable to bearer, or to a particular person or to his order.

5. *Indorsement.*—By indorsement is meant in the

<sup>1</sup> The Act defines a "bearer" as the person in possession of a bill or note which is payable to bearer. A bill is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank. He does not become the bearer of a bill or note which is transferred or assigned to him before it is indorsed to him.

<sup>2</sup> Restrictive indorsement will be explained in the sections following.

**Act** an indorsement completed by delivery. It is the act of writing one's name on a negotiable instrument, with the intent either of transferring the title thereto, or of giving extra security to the holder, or both. The word implies a writing of the name on the back of the bill, but it has been held to be immaterial where it is written. If there are numerous indorsements and the back of the instrument is filled, frequently an *allonge* is added in the form of a piece of paper attached to the bill. To prevent fraud, the first indorsement on the *allonge* should be written so that it is begun on the bill itself and completed on the *allonge*. If the indorsement is given solely to add to the security, it is said to be for accommodation. It is clear from what has been said that the act of indorsement is to be distinguished from the act of negotiation which transfers the instrument.

6. *Requisites of indorsement*.—An indorsement, in order to operate as a negotiation, must be written on the bill itself (an *allonge* is deemed to form part of the bill) and be signed by the indorser; and must be an indorsement of the entire bill. By "written" is also meant, as we have already seen, words printed, painted, engraved, and so on. Banks often use a stamp accompanied by the signature of the officer using it. The indorsement must be signed by the indorser, i.e., by the indorser or by some one acting for him and under his authority. It must be an indorsement of the entire bill, i.e., it must not be a partial indorsement, and must follow the tenor of the

instrument. So if A holds a bill reading, "Pay to the order of B the sum of five hundred dollars," he cannot indorse it, "Pay to X two hundred and fifty dollars, pay to the order of M two hundred and fifty dollars." Otherwise the maker or drawer might have to defend two actions. But there may be a partial acceptance of a bill; and an indorsement of a bill so accepted, as being an indorsement of the entire bill as accepted, would be valid.<sup>1</sup>

When a person is under an obligation to indorse a bill in a representative capacity, he may indorse it in such terms as to negative personal liability. Thus, a tutor or curator or executor, when it becomes necessary to indorse bills or notes payable to the order of some one who died, or who lost his capacity before indorsing, may indorse in his capacity as such tutor, curator, executor or otherwise, in such a way as to negative personal liability. The indorser should, however, be careful to make it apparent for whom and on whose behalf he is indorsing, and he will be wise to add also the words "without recourse," or "without recourse to me personally."

Thus, it was held by Lord Ellenborough, that a man who puts his name to a bill of exchange makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procurement of another; unless he says plainly, "I am the mere scribe," he becomes liable.<sup>2</sup> Similarly when a bill

<sup>1</sup> Maclare, p. 207.

<sup>2</sup> Leadbitter vs. Farrow, 5 M. & S., p. 349.

was drawn on "W. A. Geddes, Treas. W. I. C. Co." and he accepted it, "W. A. Geddes, Treas. W. I. C. Co." and affixed the company's seal, he was held personally liable. Had he accepted as follows: "W. I. C. Co. per W. A. Geddes, Treas.," the company, as was intended, would have been held liable. So a bill addressed "To the Sec. R. G. M. Co." and accepted as follows: "The R. G. M. Co. per Jas. Glass, Sec.," was held not to be the acceptance of the secretary, and he was not personally liable. It has also been held that an agreement in writing to indorse a bill is not an indorsement. An indorsement may be to two or more persons jointly, or to a third person, who is to hold it merely as collateral security for a smaller debt due him from the endorser. The maker or drawer may thus pay part of the instrument; if the person receiving payment writes a receipt on the back of the instrument, subsequent holders thereof may sue the prior parties for the balance only.

Maclarens, speaking of the commercial usage in the matter of endorsement, says:

Use the Christian name or initials, as in the bill or special indorsement, if there be no mistake in the name as there given, and no mis-spelling, dropping all prefixes and suffixes, such as Mr., Mrs., Miss, Messrs., Hon., Esq., etc. Where, for the purpose of identification, an addition follows, such as Merchant, M.D., M.P., K.C., or the like, it may be well to add this to the signature. A bill to the order of Mrs. John Smith may be endorsed "Mary Smith, wife of John Smith"; or a bill "To the Estate of John Jones, or order," by "A. B., Executor or Administrator late John Jones": a bill "To the order of the City Treas., Toronto," by "A. C.,

City Treas., Toronto"; a bill to the order of "The Canada Gas Co.," by "The Canada Gas Co., per E. F., Manager"; a bill "To the order of John Smith & Co.," if by a partner, should be indorsed simply "John Smith & Co.," and if by another person authorized by the firm, "John Smith & Co., per G. H., Atty.," or "Per pro. G. H." Signatures such as the following should be avoided, partly on the ground of ambiguity and partly on account of the danger of the agent or representative making himself personally liable: "A. B., agent for C. D.," "Per proc. E. F., G. H.," "J. K. for the L. M. Co., "J. K., for L. M. & Co.," "J. K., for the Estate of L. M."<sup>1</sup>

When there are two or more indorsements on a bill, any indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

*7. Kinds of indorsement.*—There are several kinds of indorsement which have been for many years recognized in law and in commercial practice, and it is well to understand the effect that a particular indorsement may have upon the rights and liabilities of the parties to a negotiable instrument.

We may take the following form of a promissory note and examine the possible indorsements thereof, and the result in each case.

MONTREAL, Sept 15, 1913.

\$5,000.

Three months after date I promise to pay to the order of John Wilson \$5,000 at the Merchants Bank of Canada, Montreal. Value received.

JOHN SMITH.

*8. Indorsements in blank.*—If Wilson indorses by

<sup>1</sup> Maclarens, p. 208.

simply signing his name, the instrument is said to be indorsed in blank, and becomes payable to bearer. It may be negotiated by delivery. If, however, Arthur Jones comes into possession of it by delivery to him, and indorses it as follows, "Pay to the order of W. Hardy," it cannot be again negotiated until Hardy indorses it. Hardy is presumed to have come into possession of the note before maturity. A holder may thus change an indorsement in blank to a special indorsement, by writing above the indorser's signature a direction to pay the bill to, or to the order of himself or some other person. If, however, he indorses the bill to himself, he must indorse it again in order to negotiate it.

9. *Special indorsements.*—As we have just seen, a special indorsement specifies the person to whom or to whose order the bill is to be payable. It is more than an indorsement in blank, because the indorser not only signs his name, but gives the direction, "Pay to A. B." or "Pay to the order of A. B."

A holder may strike out several blank indorsements; he cannot strike out a special indorsement in order to insert his own name.

10. *Qualified indorsements, or indorsements without recourse.*—If John Wilson indorses as follows, "Pay to Arthur Hardy, without recourse, John Wilson," or simply "Without recourse, John Wilson," his indorsement is said to be qualified. He may use the French expression, "*Sans recours*," or "At the indorsee's own risk." It is necessary for him to use

words showing his intention to qualify his indorsement. His contract on the bill is that he negotiates the bill by indorsement, but he does so on condition that he will not be liable to a subsequent holder.

**11. *Conditional indorsement.***—If John Wilson indorses as follows, "Pay to Arthur Hardy, unless before payment I give you notice to the contrary, John Wilson," the indorsement is conditional. A conditional indorsement does not hinder the negotiation of the note. True, the indorser has added a condition to his liability, but the Act states that when a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not. Another example of a conditional indorsement—a condition precedent, the former example being a condition subsequent—would be the following, "Pay to A or order, if he lives until he is twenty-one," or "If he is alive when the bill becomes due." The reason for the rule is that it was deemed unfair that a person who accepted a note as indorsee, for example, should have thrust upon him the burden of finding out whether or not the condition had been fulfilled. He might pay, and, if the condition were not fulfilled, be compelled to pay a second time; or had he refused he might be protested. MacLaren points out that the rule does not entitle the holder to compel payment if the condition is not fulfilled; it merely has the effect of releasing the person who pays without knowing whether the condition is fulfilled.

**12. *Restrictive indorsements.***—An indorsement is restrictive which contains terms making it restrictive; thus, an indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and is not a transfer of the ownership thereof; as, for example, if a bill is indorsed "Pay D only," or "Pay D for the account of X," or "Pay D or order for collection." By indorsing in any of these ways, John Wilson, the indorser, notifies the world that, tho he may part with the instrument itself for the purpose mentioned, he does not part with the title thereto. Whoever receives payment is not a holder in due course, but receives payment subject to the claims of John Wilson.

A restrictive indorsement makes the indorsee an agent. He may receive payment and may sue any party on the bill that his indorser could have sued, but he cannot sell or pledge the bill, and he cannot transfer his rights as indorsee unless the indorsement expressly authorizes him to do so. If the restrictive indorsement authorizes further transfer, subsequent indorsees take the note with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

**13. *Indorsement waiving conditions.***—John Wilson may indorse as follows, "Pay to Arthur Hardy, waiving protest, John Wilson." He may waive notice of dishonor or waive presentment. Thus, the indorser may relieve the holder from his duties as such

to present the note for payment, or to give notice of dishonor, and so on.

**14. *Irregular and other indorsements.***—The Canadian Bankers' Association has laid down that a regular indorsement must be neither restrictive nor conditional, and must be so placed and worded as to show clearly that an indorsement is intended; and that an indorsement, other than a restrictive indorsement, which is not in accordance with this definition of a regular indorsement, or which is so placed or worded as to raise doubts as to whether it is intended as an indorsement, is an irregular indorsement.

We have already seen that where the name of a payee or indorsee is wrongly spelled, he may indorse by writing the name as mis-spelled and placing under it his correct name, or by simply indorsing his correct name. When a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of a drawer to a holder in due course, and is said to be an indorser *pour aval*; that is, he has really entered into a contract of warranty for the drawer, by putting his signature at the foot of the bill; for the indorser by signing below the indorsement; or for the acceptor by signing below the acceptance.

It has been laid down that a signature placed upon an instrument, in such a way that it is doubtful in what capacity the person signing intended to sign, makes the person signing an indorser.

An indorsement to the cashier of a bank or cor-

poration, while not regular, is deemed to be on its face, to the bank or corporation of which the cashier is an officer, and the bank or corporation may negotiate the instrument with its own indorsement, or by having the cashier indorse it. And where one partner of an English firm did business for the firm in America in his individual name, the firm was held liable on indorsements by him. The signature of the name of the firm is equivalent to the signatures of all persons liable as partners in that firm.

**15. Transfer without indorsement.**—We have already seen, in an earlier section, that when a negotiable instrument drawn to order is transferred by assignment or otherwise, without indorsement, the person to whom it is transferred may demand the indorsement of the transferor. Such a transfer is not a negotiation of the instrument, which does not become negotiable until it is indorsed. Without such indorsement the indorsee has merely such rights as the indorser had. When a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name. Thus, when a bill was drawn and indorsed by a wife in her own name in the presence of her husband and under his direction, it was treated as the bill of the husband, and he was held liable.

A partnership note is signed "Evans, Harris & Co." by a member of the firm, and this signature operates as the signature of all partners in the firm, whether they are active, dormant or secret; by holding

themselves out as partners they are liable as such to third parties. The reason for this is, as we shall see later, when we come to study the subject of partnership, that each partner is supposed to have the consent from his co-partners for all acts connected with the partnership business.

16. *Delivery*.—The first element of negotiation is, as we have seen, indorsement. The second is delivery. Delivery means the transfer of possession, actual or constructive, from one person to another.

By constructive possession is meant, for instance, the actual possession which a servant or agent may have on behalf of his principal, who thus has the constructive possession. But, as Maclaren points out, delivery does not always imply an actual transfer from one possessor to another. Thus, if A holds a note for B, A may become the owner of it by some arrangement between himself and B, and delivery is complete without an actual change of possession, if it can be said that it has been made by or under the authority of the party drawing, accepting or indorsing, as the case may be. Delivery is the final step which perfects the existence of the contract, and even tho the bill or note may have been placed in the hands of an agent for delivery, until it has been delivered it may be recalled. As between immediate forces, as, for example, between the maker and the payee, the indorser and the indorsee, and as regards a holder not in due course, delivery to be effectual must be actually made. It may be shown also to have been con-

ditional, or for a special purpose only, and not for the purpose of transferring property in the bill. If, however, the bill is in the hands of a holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is presumed. So when a debtor made a promissory note in favor of a creditor for the amount of his claim, and died before delivering it, the note is not valid if delivered subsequent to the debtor's death. It has been held, also, that as a letter, when posted, becomes the property of the party to whom it is addressed, if it contains a bill, this is a delivery.<sup>1</sup> It has also been held that when a bill was specially indorsed and inclosed in a letter addressed to the indorsee, and, having been placed in the office letter box of the indorser, was stolen by a clerk before posting or delivery, and the clerk forged an indorsement and negotiated the bill, the property in the bill remained in the indorser. So, when A mailed a note payable to bearer, and it was stolen by C, who handed it to X upon receiving the amount of the note, and X did not know that C had stolen it, X is a holder in due course and may recover from A; but as between A and C, there was no delivery, and as they were immediate parties, C could not recover from A. A would, however, have to show that the note had been stolen.

The person in possession of a bill payable to bearer or indorsed in blank is entitled to receive payment in due course, and tho he may be a thief, the finder or

<sup>1</sup> *Ex Parte, Cote, L. R. 2 Ch. 27 (1873).*

a fraudulent holder, payment in good faith to him is valid.

A bill or note may be delivered to be held in escrow, that is, to be held as a mere blank writing until the happening of some event, or the fulfilment of some condition. Upon the happening of the event or the fulfilment of the condition, the bill or note becomes operative, and delivery is complete.

17. *Holder in due course*.—A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

A holder in due course is to be distinguished from a mere holder. The holder of a bill or note is the payee or indorsee thereof who is in possession of it, or who is the bearer thereof. He may or may not be the legal owner. The term is a general one and may mean a holder in due course. A person is a holder if he has possession and is entitled at law to recover or receive the contents of a bill or note from another person. Every holder of a bill is *prima facie* deemed to be a holder in due course, unless it is shown that the acceptance, issue or subsequent negotiation of the bill is affected with fraud or other irregularity, when the

burden of proof is on the holder to show that he is a holder in due course, unless he can show that subsequent to the alleged fraud or irregularity, value in good faith has been given by some other holder in due course. The expression "holder in due course" is the equivalent of the expression "bona fide holder for value, without notice." When value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time. The holder for value may not be a holder in due course; he may only have come into possession of the bill or note after maturity and dishonor, but he can recover, tho he has not given value himself, if he can show that some previous holder has given value.

18. *Regularity of face of instrument.*—The statute requires that to constitute a person a holder in due course, he must take a bill complete and regular on the face of it, under the conditions above mentioned. In other words, the instrument must fulfil the requirements of our definition of a bill or note. Thus, an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect. If the bill contains an erasure or some ambiguous or uncertain clause, or if it is undated and is payable at a fixed period after date, it is irregular. The transferee should be careful to discover whether the irregularities are due to the instrument having been issued out of the regular course of

business, or, if in the regular course of business, whether they can be corrected or explained.

A bill is not invalid merely because it is undated. If a person takes a bill which is not complete, it will not be enforceable against any person who became a party thereto prior to the completion, unless it is filled up and completed within a reasonable time, and strictly in accordance with the authority given. If, after completion, it is negotiated to a holder in due course, the latter may enforce it as though it had been filled up within a reasonable time, and strictly in accordance with the authority given. It has been held that a check is not irregular on its face if post-dated. The bill must not appear on its face to have been cancelled; the cancellation, if made unintentionally or under a mistake, or under the authority of the holder, is inoperative, but the burden of proof lies on the party who alleges the mistake or lack of authority.

**19. *Maturity.***—A holder in due course must become the holder of the bill before it is overdue, otherwise he is not a holder in due course. A note is due when the principal is to be paid. It has been laid down that, tho the interest may be overdue, this does not deprive a holder of his quality as a holder in due course. A bill payable on demand matures a reasonable time after demand. It is deemed to be overdue when it can be seen from the instrument that it has been in circulation for an unreasonable time. When a note is payable on demand and has been indorsed, it must be presented for payment within a reasonable

time, or the indorser is discharged. If, however, it has been delivered, with the assent of the indorser as a collateral or continuing security, it need not be presented for payment so long as it is held for such security.

In determining what is a reasonable time, regard must be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. It has been held that a bill drawn in Toronto on August sixth by a party dealing in bills, on New York, payable at sight, in favor of a party living in Illinois, to be sent there as a remittance and for circulation, which passed thru a number of hands and was presented in New York on November tenth, was presented within a reasonable time.<sup>1</sup> With our better transportation facilities, this delay would probably be considerably shortened, this decision having been rendered in 1850. There is no absolute rule. MacLaren states that in France there is a limit for presentment of three months fixed for Europe and Algeria, four months for Asia, six months for America and Southern Africa, and one year for the rest of the world.<sup>2</sup>

**20. *Without notice of dishonor or defect.***—The holder in due course must have taken the bill without notice that it had been previously dishonored, or of any defect in the title of the person who negotiated it to him. In other words, he must have taken the in-

<sup>1</sup> Boyes vs. Joseph, 7 U. C. Q. B. 505 (1850).

<sup>2</sup> MacLaren, p. 239.

strument in good faith. It is not necessary that formal notice of any kind should have been given him, if there existed good ground for suspicion that the instrument was irregular, or that he was taking it under improper conditions. He must not wilfully shut his eyes. He must investigate any circumstances which to an ordinary business man would appear suspicious. Thus, if A, especially if he is a stranger, offers to give B a note for \$500 upon receiving \$300 and A had stolen it from X, who made it, B cannot be considered a holder in due course, because the difference between the amount of the note and the amount he paid for it was a sufficient indication that there was irregularity in the transfer. He becomes a mere transferee, and a transferee in bad faith, with no better rights than A had against X.

Mere negligence on the part of the transferee is not enough to deny him the status of a holder in due course, as it is not altogether a question of diligence or negligence in making inquiry in every suspicious case. Good faith is presumed, and a thing is deemed to be done in good faith when it is in fact done honestly, whether negligently or not. As Lord Blackburn has pointed out, there is a difference between honest blundering and dishonest refraining from inquiry. What the court will attempt to discover is whether the transferee acted fairly and honestly. If the transferee receives notice of a defect in title, or of previous dishonor, he does not become a holder in due course; and notice to an agent has been held to

be notice to the principal, tho, if a bill is negotiated to the agent and notice is given to the principal, it has been held that a reasonable time must be given for communication between them. Notice may not have been given directly. The indorsee may have come into knowledge of the facts. Thus if he takes a check from the payee, knowing that the drawer claimed that it had been delivered only conditionally and that he had stopped its payment, he is not a holder in due course. The erasure of the name of one of the sureties of the note is an irregularity in the note which should put the purchaser upon inquiry.<sup>1</sup> Similarly, the erasure of the indorsement of the payee by a thief has been held to be an irregularity sufficiently patent to have put the purchaser on his guard. In another case, in which a bank accepted a bill that had been given for coal to be delivered, it was held that the bank became a holder in due course, tho it turned out that the coal was not subsequently delivered. As we have already said, good faith is presumed; it would be impossible to do business if the history of every negotiable instrument had to be investigated.

**21. Consideration.**—A holder must have taken the bill for value; if he has not paid value he is not a holder in due course. Value means valuable consideration. Valuable consideration may be constituted by any consideration sufficient to support a simple contract, or by an antecedent debt or liability. The

<sup>1</sup> McCramen vs. Thompson, 21 Iowa, 244.

consideration may be some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.<sup>1</sup> Every party whose signature appears on the bill is *prima facie* deemed to have become a party thereto for value, whether the bill or note contains the words "value received" or not. When a note is received as collateral security, the holder has a lien on it, and he is deemed to be a holder for value to the extent of the sum for which he has a lien; that is, he has a right to retain possession of the bill or note until his claim is satisfied.

22. *Negotiation of bill.*—The bill must have been negotiated to the holder in due course. That is, it must have been transferred to him in such a way as to constitute him the holder. If a bill is payable to bearer, it is negotiated by delivery; if payable to a specified person or to order, it is negotiated by indorsement and delivery. A holder who derives his title thru a holder in due course, and who is in good faith and not a party to any fraud or illegality affecting the instrument, has all the rights of such holder in due course, as against prior parties. It would be unfair that a person deriving his title from a holder in due course should find himself unable to further negotiate the note, owing to some informality or illegality due to the act of a prior holder. Thus, if A gives a note for five hundred dollars to B, and C steals it and forges B's signature and thus transfers it to

<sup>1</sup> Currie vs. Misa, L. R. 10 Ex. 162.

**D**, and **E** hears of the circumstances and accepts the note from **D**, paying value for it, **E** can recover from **A**, because his predecessor **D** was a holder in due course; but if **E** transferred it to **C**, the latter, being the thief, could not collect from **A**.

**23. Rights of a holder in due course.**—A holder in due course holds a bill or note free from any defect of title of prior parties, as well as from personal defenses available to prior parties among themselves, and may enforce payment against all parties liable on the instrument. Among these personal defenses would probably be included the defense of fraud, illegality, want or failure of consideration, threats or a plea of compensation or set-off. They would not include want of capacity, want of authority, the defense of forgery, or the like.

We have said that every holder is presumed to be a holder in due course. This presumption would be overcome if one or more of these personal defenses were proved. Upon such a defense being raised, the holder must then prove that he is a holder in due course—that is, a bona fide holder for value, without notice of any defect. A note given for an illegal consideration, for example, to induce a witness not to give evidence in a criminal prosecution, may be collected by a bona fide holder for value before maturity. A note fraudulently made by a partner in the partnership name binds the firm in the hands of a bona fide holder for value. But a promissory note made by a married woman, separate as to property, in fa-

vor of a creditor of her husband, is absolutely null, and no action, it has been held in Quebec, can be maintained thereon by a bank which has discounted the same in good faith before maturity, in ignorance of the cause of nullity. The rigor of this rule has been relaxed, in that a third party in good faith, like the bank in question, can now recover. The good faith of the third party will, however, be very zealously scrutinized. However, it has been held in England, in Quebec, in Manitoba, in Illinois and in Wisconsin (the principle is of general acceptance) that when an illiterate man was led to believe that he was becoming a party to an agreement, but the instrument proved to be a promissory note, and he was not guilty of negligence, he is not liable on the note even to a holder in due course.

#### REVIEW

What is the effect of assignment?

Explain transfer by operation of law.

What is meant by negotiation by simple delivery; by indorsement; by allonge?

Give the chief requisites of an indorsement.

What is an indorsement in blank; a special indorsement; a conditional indorsement; a restrictive indorsement; an indorsement waiving conditions; an irregular indorsement?

Discuss the holder in due course? How is he distinguished from a mere holder? What are his rights?

## CHAPTER XV

### CONTRACT OF PARTIES

1. *Maker's contract*.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor. By paying according to its tenor is meant that he will pay according to the contract made by him, and as it appeared on the face of the instrument when he delivered it. He is precluded from denying to a holder in due course the existence of the payee and the capacity of the payee to indorse at the time of indorsement. For all practical purposes, the maker of a note, for example, corresponds to the unconditional acceptor of a bill of exchange. His contract is interpreted strictly against him, because so far as the instrument itself shows, his contract thereon is made voluntarily. He is the primary debtor. Indorsers are secondarily liable until the note has been dishonored and notice given to them. Ordinarily, a promissory note made payable at a particular place must be presented for payment at that place, but the maker is not discharged by the omission to present the note for payment on the day that it matures. If he is sued upon the note without its having been presented, he may plead the fact, and tho he will not escape liability on the note itself, the costs of the action will be in the discretion of the court.

If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable. The note may be made by two or more makers, and they may be liable thereon jointly or jointly and severally, according to its tenor. Where a note runs, "I promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note; that is, each can be sued for and be forced to pay the whole amount of the note. If they are jointly liable only one action can be taken. As the maker of a note is, in these respects, similar to the acceptor of a bill of exchange, the rules above mentioned apply in so far as they are applicable to both.

2. *Acceptor's contract.*—The drawee, that is, the person upon whom a bill of exchange is drawn, until he accepts, is not liable on the bill. By accepting he signifies his assent to the order of the drawer, and his acceptance is irrevocable; but only delivery of the instrument so accepted by him gives effect thereto, unless after having accepted, but before delivery, he gives notice to the person entitled to the bill that he has accepted it. His acceptance then becomes complete and irrevocable. Having accepted and delivered the bill, he of course becomes liable to the holder, according to the terms of his acceptance. But his acceptance must be in writing, and must be signed as such. His acceptance is invalid if it expresses that he will perform his promise by any other means than the payment of money. The mere signature of the

drawee, however, written on the bill without additional words is a sufficient acceptance. It has been held that, tho the acceptance and signature of the drawee are usually written across the bill, it will be valid when written below the drawee's name, or above it, or parallel to it, or even on the back of the bill.<sup>1</sup> If written on the back of the bill, it may be doubtful whether an indorsement or an acceptance is intended, unless the word "accepted" is used in connection with the signature. The acceptance may be upon a blank paper and may be delivered to be filled up as a bill, when it will be binding. It may be accepted before it has been signed by the drawer, or while otherwise incomplete. It may be accepted when it is overdue, or after it has been dishonored by protest, by refusal to accept or by non-payment. But a bill accepted when overdue is payable on demand. When a bill payable at sight or after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentation to the drawee for acceptance.

Under our law a promise to accept is not an acceptance, tho the drawee who gives such a promise could be held liable on his contract, tho not as an acceptor. The act is explicit in stating that the acceptance must be written on the bill, and while at one time a verbal acceptance was binding, it is not so now. The drawee may accept a bill on the day of its due presentment to

<sup>1</sup> Daniel, Sec. 498.

him for acceptance, or at any time within two days thereafter. If it is not so accepted, the holder should treat it as dishonored by non-acceptance. If he does not treat the bill as dishonored, the holder loses his right of recourse against the drawer and indorsers.

**3. Facts which acceptor admits, and facts which he does not admit.**—The acceptor of a bill, by accepting it, is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill. If the bill is payable to the bearer's order, the acceptor is precluded from denying the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement. If the bill is payable to the order of a third person, the acceptor cannot deny to a holder in due course the existence of the payee and his then capacity to indorse, but is not precluded from denying the genuineness or validity of his indorsement. By this is meant that the acceptor, by the act of acceptance, admits and warrants to a bona fide holder that the payee has capacity to indorse, but he does not warrant the validity or genuineness of the indorsement.

**4. Kinds of acceptance.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A general acceptance will be implied where the acceptor has written his name, with the word "accepted," across the face of the bill. A qualified acceptance is express

terms varies the effect of the bill as drawn. An acceptance is qualified which is:

- (a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated.
- (b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
- (c) Qualified as to time.
- (d) The acceptance of some one or more of the drawees, but not of all.

While a bill of exchange is an unconditional order to pay, the acceptance is none the less valid if conditional. The acceptor is liable upon the fulfilment of the condition. Thus, an acceptance is conditional when it is in the following terms: "If a certain house shall be finished"; "when in funds from the estate of C"; "as soon as he should sell such goods"; "on condition that it be renewed." But an acceptance to pay at a specified place is not on that account conditional or qualified. A distinction is drawn between an acceptance which changes the place of payment, which is a qualified acceptance, and an acceptance which merely adds another place, which is not a qualified acceptance.

The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, may treat the bill as dishonored by non-acceptance. If the drawer or indorser of a bill receives notice of a qualified acceptance and does not

within a reasonable time express his dissent to the holder, he is deemed to have assented. When a qualified acceptance is taken, and the drawer or indorser has not expressly or impliedly authorized the holder to take it, or does not subsequently assent thereto, the drawer or indorser is discharged from his liability on the bill. This rule does not apply, however, when notice has been given of a partial acceptance. The holder who takes a qualified acceptance really does so at the risk of releasing the drawer and indorser, unless they assent, as above explained.

5. *Who may accept.*—The drawee to whom a bill is addressed must accept it. The authorized agent of the drawee may, however, accept for him. The rule suffers an exception or two. The drawer of a bill, or an indorser, may insert in the bill the name of a person who shall be called the referee in case of need, to whom the holder may resort, that is, in case the bill is dishonored by non-acceptance or non-payment. But it is at the option of the holder to resort to the referee in case of need, as he thinks fit. And when a bill of exchange has been protested for dishonor by non-acceptance, or has been protested for better security, and is not overdue, any person who is not a party already liable on the bill may, with the consent of the holder, intervene and accept the bill after protest for the honor of any party liable on it, or for the honor of the person for whose account the bill is drawn. The acceptor for honor is only secondarily liable on the bill. By accepting, he engages that he

will, upon the bill being properly presented, pay it according to the tenor of his acceptance, if it is not paid by the drawee. But in order to hold the acceptor for honor, the bill must be duly presented to the drawee for payment, and be protested if not paid. Notice of these facts must be given to the acceptor for honor.

6. *Effect of acceptance and refusal to accept.*—When a bill is accepted, it may be held or may be negotiated until it matures. Upon maturity it is presented to the acceptor for payment. If he does not pay, the bill is dishonored for non-payment. Notice of dishonor must be given to the drawer and to each indorser, otherwise they are discharged. But when a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission are not prejudiced by the omission. In the Province of Quebec, whether the bill is an inland or a foreign bill of exchange, it should be protested, to hold the drawer and any indorsers. Elsewhere in Canada only a foreign bill need be protested under these circumstances.

7. *Drawer's contract.*—The drawer is the person who addresses the bill. His contract, as we have seen, is not complete until delivery. The drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid, according to its tenor, and that if it is dishonored he will compensate the holder or any indorser; he is compelled to pay it if the requisite proceedings on dishonor, as we have stated

them, are duly taken. When drawing the bill, however, he may negative or limit his own liability to the holder, or he may waive as regards himself some or all of the holder's duties; for instance, he may waive notice and protest. If he stipulates that he will not be liable on the bill, then the holder must look to the acceptor alone and to any indorser who may be liable. If he limits his liability as to the amount, he will be liable only to that extent. The drawer very infrequently makes such a stipulation, but as we have elsewhere seen, an indorser very frequently adds to his indorsement the words, "without recourse," "no personal liability." The drawer of a bill therefore warrants that there is a drawee who will and can accept.

**8. *Indorser's contract.***—The indorser of a bill by indorsing it engages that on due presentment it shall be accepted and paid, according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent endorsee, who is compelled to pay it, provided that the proper proceedings on dishonor are duly taken. Of course, in the case of an indorser of a note, there is no presentment for acceptance. But to hold the indorser of a bill there must be presentment to the acceptor, as a preliminary. Whether the instrument be a note or a bill, it must be presented for payment on the due date, and if it is dishonored, notice must be given to the indorser, with protest when necessary, in order to hold the indorser liable. Payment by the indorser does not discharge the bill or note. He may again negotiate it by striking out his

own and subsequent indorsements, and if it is indorsed to him he must re-indorse.

9. *Warranties of indorser*.—If an indorser indorses without qualification, he warrants to all subsequent holders, and is precluded from denying, the genuineness and regularity of the drawer's signature and all previous indorsements. He is also precluded from denying, and therefore warrants, to his immediate or a subsequent indorser that the bill was, when he indorsed it, a valid and subsisting bill, and that he had then a good title to it. So when a partner, having authority to draw and indorse, raised money for firm use by drawing bills in fictitious names, and indorsed them in the firm name, his co-partner was liable to an indorsee. Nor could an accommodation indorser<sup>1</sup> in an action by a holder in due course plead that the signature of the maker is forged. It has also been held that the indorser of a note made by a corporation cannot allege that it is *ultra vires*. When a person indorses "without recourse" or merely transfers or assigns the instrument, he does not warrant that it is valid—he transfers no better rights than he himself has—but he does warrant that he knows of no defect which will invalidate or impair the validity of the instrument. He does not incur the liability of an ordinary indorser.

10. *Liability of indorsers among themselves*.—When there are two or more indorsements on a bill,

<sup>1</sup> An accommodation party to a bill or note is a person who has signed it as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. Each indorser therefore obliges himself to compensate the holder or a subsequent indorser who pays, if the usual formalities upon dishonor have been complied with. An agreement may exist as between the indorsers that they shall not be liable in this order. They may agree upon any order of liability. A bona fide holder may, however, call upon the indorsers for payment in the order of their signatures, even tho he knew, when he took the instrument, that there was an agreement between them that they would be liable in some other order.<sup>1</sup> Gerstenberg and Hughes give the following example. A bill reads, "Pay to the order of B \$100. A." The following indorsements are found on the back thereof—"Pay to C. B"; "Pay to E without recourse. D"; "E." At maturity the bill is presented by the holder, F, and A refuses to pay. F notifies all the indorsers. He may sue any or all of them except D, unless there is a breach of one of the implied warranties spoken of in the previous section. If he recovers from E, E may recover from C, B or A. B may recover from A. It is usual for a holder who has a mature unpaid instrument to join all parties liable on the instrument as defendants in one suit.

**11. Liability of other parties.**—As we have seen, an accommodation party to a bill may sign as drawer, acceptor or indorser; to a note as drawer or indorser.

<sup>1</sup> Elder vs. Kelly, 8 U. C. Q. B. 240.

He is liable to a holder for value, tho as an accommodation party he has signed without receiving value, whether or not the holder who takes the bill or note knew that he was an accommodation party. He is not liable to the person whom he accommodates. He may set up any defense that the person accommodated could set up. If the holder knows of the relation between the accommodation party <sup>1</sup> and the party accommodated, and gives time to the latter to pay, the former is released. A second accommodation indorser, who has paid a note, may, it has been held, recover from a prior accommodation indorser. But it has been held that a manufacturing corporation has no power to bind itself as an accommodation party. The plaintiff must show both that he paid value and also that he did not know of the accommodation character of the instrument.<sup>2</sup>

When a person gives a guarantee, on a note, for instance, that it will be paid, he becomes a warrantor of the obligations of the drawer or indorser, as the case may be. He has signed, otherwise than as drawer or acceptor, and under the act, thereby incurs

<sup>1</sup> An accommodation party has been well defined in an American case—*Cheever vs. Railroad*, 150 N. Y. 59—as follows:

An accommodation party is one who has no interest in the consideration, but signs as maker or indorsee merely to lend his credit to the instrument; he may do this for a consideration or as a friendly act. He is liable to the holder, but the paper must not be diverted from the purpose for which the accommodation is given. But if wrongfully diverted paper is taken by the holder bona fide and without knowledge of imperfections his rights cannot be defeated.

<sup>2</sup> *National Bank vs. Snyder Co.*, 117 App. Div. 370.

the liabilities of an indorser to a holder in due course. He is liable without notice of dishonor or protest. He is bound by any notice given to the person whose liability he warrants.

12. *Damages.*—A person who promises to accept a bill, and does not do so, may be liable in damages. When a bill or note is dishonored, the measure of damages deemed to be liquidated damages will be the amount of the bill or note, interest from the time of presentment in case of a bill payable on demand, and from maturity in the case of a time bill or a note, together with the expenses of noting and protest. Among the expenses re-exchange would also be included. In case of a bill which has been dishonored abroad, in addition to the damages just mentioned, the holder may recover from the drawer or any indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until paid. Re-exchange has been defined as the act of drawing a sight draft on the drawer to make good the loss on the dishonored bill. The amount of the re-exchange is the amount of the loss resulting from the dishonor of a bill in a country other than that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the *then rate of exchange* on the place where the drawee or indorser sought to be charged

resides) must be drawn, in order to realize, at the place of dishonor, the amount of the dishonored bill, and the expenses consequent on its dishonor.

### REVIEW

What is meant by paying a negotiable instrument according to its tenor? Is presentment necessary to fix the maker's liability?

Discuss the contract made by the acceptor.

What facts are admitted and what not admitted by the act of acceptance?

What kind of acceptance may there be? Discuss qualified acceptance.

Who may accept an instrument?

Explain the indorser's contract. What warranties are made by an unqualified indorsement? How are indorsers liable among themselves?

## CHAPTER XVI

### PRESENTMENT AND NOTICE OF DISHONOR

1. *Presentment for acceptance.*—When a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument: a sight bill being payable on the third day after acceptance, and a bill payable after sight being payable on the third day after the expiry of the time after sight stated in the bill. A bill payable at sight is not, under our law, payable on demand. So also when a bill expressly stipulates that it shall be presented for acceptance, or if it is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. In no other case, says the act, is presentment for acceptance necessary in order to render liable any party on the bill. The drawer and indorsers are entitled to have the bill presented for acceptance in the cases above mentioned; otherwise they are discharged as toward the holder. When a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of pay-

ment. If a bill is payable at sight, or at a fixed period after sight, the time begins from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance or for non-delivery. When, in such a case, one or more do not accept, the acceptance becomes at once qualified, and the drawer and indorsers will be discharged unless the holder has notified them, or has treated the bill as dishonored.

When authorized by agreement or usage, a presentment thru the post office is sufficient. When the drawee is dead, presentment may be made to his personal representative. But presentment is excused, and the bill may be treated as dishonored for non-acceptance, when the drawee is dead, or is a fictitious person, or a person not having capacity to contract. It is also excused when, after the exercise of reasonable diligence, presentment cannot be made, for instance if the drawee cannot be found. It is not excused simply because the holder has reason to believe that the bill, on presentment, will be dishonored. The duties of the holder with respect to presentment for acceptance or payment, and the necessity for, or sufficiency of, a protest or notice of dishonor, are determined by the law of the place where the act is done or the bill is dishonored.

**2. Presentment for payment.**—If the bill is not duly presented for payment, the drawer and indorsers are discharged. They are entitled to have every formality strictly observed. As toward the acceptor

himself, as he is primarily liable, presentment for payment is not necessary to hold him liable. But, if he has been sued on the bill, without having been given a chance to pay it by having it presented to him for payment, the court may award the costs in its discretion. When, however, a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Presentment for payment or protest, if the bill is noted or protested for non-acceptance, is made by the holder.<sup>1</sup>

A word should also be said here as to how the due date of a bill is determined. Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated, unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month, with the addition, in all cases, of the days of grace. The term "month" in a bill means the calendar month.

**3. When, where and how made.**—A bill is duly presented for acceptance when it is presented, by or on behalf of the holder, to the drawee, or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and

<sup>1</sup> When a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof. (*Section 120.*)

before the bill is overdue. If it is accepted after maturity, it becomes a demand bill, and subject to the rule that, in order to hold the indorser liable, it must be presented for payment within a reasonable time after its indorsement, and a reasonable time after its issue, in order to hold the drawer. What is a reasonable hour for presentment will depend on the circumstances. If presentable at a man's office, it should be during ordinary office hours, or during banking hours, if at a bank; if at his house, probably at any reasonable hour when he would ordinarily be there.

When a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, by some person authorized to receive payment on his behalf, at the proper place, and either to the person designated by the bill as payer, or to his representative or some person authorized to pay or to refuse payment on his behalf. Delay in making presentment for payment is excused when caused by circumstances beyond the control of the holder, and not imputable to his misconduct or negligence. But when the delay ceases to operate, presentment must be made with reasonable diligence. Thus, when a note was lying at a branch bank where it was payable, and the new agent was not aware of the fact until noon of the day after maturity, when he had it protested and notice given, it was held this was sufficient to bind the indorser.

Presentment for payment is dispensed with when, after the exercise of reasonable diligence, the presentment cannot be effected, or when the drawee is a fictitious person (in which case the instrument may be treated as a promissory note). It is also dispensed with as regards the drawer, when the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that it will be paid if presented; or as regards an indorser, when the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented. Presentment may also be waived, expressly or impliedly. It is not dispensed with merely because the holder has reason to believe the bill will not be paid when presented. If the acceptor is dead, the bill may be presented to his executor or representatives.

If payment is made, the bill or note, as the case may be, is delivered. If payment is refused, the drawer and indorsers are notified that the payment has not been made, and are protested when necessary. Presentment for payment is necessary in order to hold the indorser of a note liable; and the rules as to presentment, with the exception of course of those relating to presentment for acceptance, apply, in so far as they may, to notes as well as to bills.

*4. Time and place of presentment for payment.*—A bill or note is duly presented for payment if, when not payable on demand, it is presented on the day it

falls due. The day on which it falls due is the third day of grace, unless that be a non-business day. It would in that case fall due on the next business day. A demand bill must be presented for payment within a reasonable time after its issue to render the drawer liable, and within a reasonable time after its indorsement to render the indorser liable. Checks and demand notes must be presented for payment within a reasonable time after issue.

Presentment is to be made at the place specified in the bill or acceptance. Hence, when a bill was payable at the office of the acceptor at Swansea, and was presented to him personally at Newport, it was held that an indorser was not liable.<sup>1</sup> If no place of payment is specified and no address is given, it must be presented at the drawee's or acceptor's place of business, if known, and, if not, at his ordinary residence, if known; in other cases, at the last known place of business or residence. If the instrument is at the bank or other place of payment at maturity, presentment is complete.

*5. Presentment waived and dispensed with.*—When a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can there be found, no further presentment to the drawee or acceptor is required. The drawee or acceptor is supposed to arrange for payment, and either to be on hand himself, or to have someone at the place of pay-

<sup>1</sup> Beirnstein vs. Usher, 11 T. L. R. 356 (1895).

ment to represent him. If not, or if the place of payment, his office for instance, is closed during reasonable hours, no further presentment is necessary. If the place of payment is specified as a city, town or village, where there are many banks or none at all, and no place of payment therein is specified, the bill or note may be presented at the debtor's known place of business or known ordinary residence, or, in lieu thereof, at the post office or principal post office. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. But so soon as the cause of the delay ceases to operate, presentment must be made with reasonable diligence. Presentment may be waived by the endorser writing after his name, "Protest waived," "Presentment waived."

6. *Payment for honor.*—When a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. Upon paying the amount of the instrument and the notarial expenses incidental to its dishonor, he is entitled to receive the instrument and the protest. In order that a payment for honor *supra* protest shall operate as such, and not as a mere voluntary payment, what is called a notarial act of honor must be made and be attached to the protest or form an extension of it. It is based upon a declaration of the person who pays, declaring

his intention to pay for honor, and for whose honor he pays, and is in the following form:

On the 21st day of September, one thousand nine hundred and —, I, Herbert Barton, Notary Public for the Province of Ontario, dwelling at the City of Toronto in said province, do hereby certify that the original bill of exchange for five hundred dollars annexed to the protest thereof on the other side hereof written, was this day exhibited to A. B., of Toronto, Manager, who declared before me, that he would pay the amount of the said bill and protest charges for the honor of C. D., the last indorser thereof, holding the drawer and indorsers and all other persons responsible to him, the said A. B., for the said sum and for all interest, damages and expenses. I have therefore granted this notarial act of honor accordingly. Which I attest.

(SEAL)

HERBERT BARTON, N. P.

When a bill has been paid for honor, and the formalities just mentioned have been observed, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated in, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party. So it has been held that if the holder is a holder in due course, or if any party subsequent to the party for whose honor the bill has been paid was a holder in due course, the payer for honor acquires their rights in this respect. He must, as one of his duties, give notice of dishonor.<sup>1</sup>

*7. Notice of dishonor.*—When a bill has been dishonored by non-acceptance or by non-payment (by non-payment in the case of a note), notice of dis-

<sup>1</sup> Goodall vs. Polhill, 14 L. J. C. P. 146 (1845).

honor must be given to the drawer and each indorser; a drawer or indorser who is not so notified is discharged, tho a holder in due course subsequent to the omission is not prejudiced. Notice must be given not later than the juridical or business day next following the dishonor of the bill.

8. *By whom notice is given.*—Notice may be given by, or on behalf of the holder, or by or on behalf of an indorser, who at the time of giving it is himself liable on the bill. Hence, when a note payable at a bank is sent there for collection, the protest may properly be made and notice be given by the bank, altho it has no interest in the note. Each party who receives notice of dishonor has the next following business day to send notice to parties whom he, in turn, may wish to hold liable.

9. *Sufficiency of notice.*—The return of a dishonored bill to the drawer or an indorser is a sufficient notice of dishonor. The notice need not be signed. If insufficient, the notice may be supplemented and validated by verbal communication. It may be given in writing or by personal communication, and in any terms which identify the instrument and intimate that the bill has been dishonored by non-acceptance or non-payment. An error in the description of the instrument will not vitiate the notice unless the person to whom it is given is misled thereby.

10. *Time within which notice must be given.*—Notice of dishonor must be given on the day when presentation has been made, or on the next following

business day. This rule is satisfied if the notice is either served or posted within this delay. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, conduct or negligence. Thus the death or sudden illness of the holder or his agent who has the bill, will be a good excuse, or delay caused by the indorser having given a wrong or illegible address.

**11. *Place of notice.***—Notice of dishonor of a bill or note is sufficiently given if addressed in due time to the person, entitled to such notice, at his customary address or place of residence, or at the place at which the bill is dated, unless any party so entitled to notice, has under his signature, designated another place. Where notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, even if the notice miscarries in the post.

**12. *Notice waived and excused.***—Notice of dishonor is dispensed with, when after the exercise of reasonable diligence, notice cannot be given or does not reach the drawer or indorser who is sought to be charged. It may be excused by waiver, express or implied. The waiver may be in writing or oral. Thus it has been held that where an indorser asked for time and promised to pay, it was a waiver of notice. Notice of dishonor is dispensed with as regards the drawer, where the drawer and the drawee are the same person; where the drawee is a fictitious person, or a person not having capacity to contract; where the

drawer is the person to whom the bill is presented for payment; where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; and where the drawer has countermanded payment. It is dispensed with as regards the indorser where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time but indorsed the bill; where the indorser is the person to whom the bill is presented for payment; and where the bill is accepted or made for his accommodation.

**13. *Protest.***—The protest of bills and notes is done by a notary public who establishes and certifies that the instrument has been presented and dishonored. The notary's certificate is authentic and makes proof itself of its contents, and hence while protest is necessary only for foreign bills of exchange, except in the Province of Quebec where inland bills also must be protested, a formal protest in other cases makes it easy to prove dishonor and notice to the drawer and indorsers. Protest is not necessary to render the acceptor of a bill liable. It is dispensed with by any circumstances which would dispense with notice of dishonor, as just above set out. Delay in noting or protest is excused by reason of circumstances beyond the control of the holder, where these are not due to his fault, misconduct or negligence. A bill which has been protested for non-acceptance or a bill of which protest for non-acceptance has not been waived, may be subsequently protested for non-pay-

ment. A bill must be protested at the place where it is dishonored.

To facilitate the making of protests in country districts, the act also provides that protest may be made at some other place in Canada situated within five miles of the place of presentment and dishonor of the bill. Tho, when a bill is presented thru the post office and is returned by post dishonored, it may be protested at the place to which it is returned, on the day of return or on the next day.

#### REVIEW

When is presentment for acceptance necessary for a bill payable at sight; when after sight?

How is a bill presented for acceptance? When and where should it be presented?

When is presentment for payment necessary? Where must it be made? When must it be dispensed with?

At what time is it necessary to present demand bills, checks and demand notes? Where must presentment be made?

Discuss the waiver of presentment.

What are the rights and liabilities of the payer for honor?

How is a bill protested? When is it necessary and where must it be made?

## CHAPTER XVII

### DEFENCES

**1. *Definition.***—Defences are described as personal defences and real defences.

Personal defences include conditional or equitable defences, and are good when pleaded by a person as against his immediate successor, or as against someone who is not a holder in due course.

The real or absolute defences attack the instrument itself and strike at the very foundation of the contract. The real defences are good against all the world.

Personal defences are defences not necessarily attached to or inherent in the instrument. They include defences such as fraud, threats or violence, illegality where the illegality does not void the contract, release, want of title in the person transferring, renunciation of claim or payment, want or failure of consideration, and others.

**2. *Fraud and threats of violence.***—Fraud enters where a person is induced to act by some misrepresentation or untrue statement intentionally made for the purpose. Violence or fear and threats, commonly included under the word duress, will vitiate a contract. Thus a note given to a person in consequence of threats to prosecute the maker for forgery and ob-

taining money under false pretences, cannot be recovered by such person. So, too, where a defendant's son had committed forgery, and the notes sued upon were given to the plaintiff to prevent the scandal becoming public, they were held to be void. But it has been held that where a master gave a female servant his note for \$1,500 over and above her wages, on condition that she would not marry but would remain in his service as long as he wanted her to, the note was not void for being in restraint of marriage for an unreasonable period.<sup>1</sup> It has also been held that where a creditor secured secretly the notes of the insolvent for the balance of his claim, this was a fraud on the indorsers of the composition notes, and they were entitled to the benefit of this payment. And again, where an illiterate man thought that he was making his mark to a receipt and the plaintiff concealed the fact that it was really a promissory note, the plaintiff could not recover. It has been held, however, that where an educated man admits his signature but sets up such a defence, he must make very clear proof.

*3. Partial or total want of value or consideration.*—Valuable consideration for a bill or note may be constituted by any consideration sufficient to support a simple contract. It may be an antecedent debt or liability. Every party whose signature appears on a bill or note is presumed to have become a party to it for valuable consideration, but he may prove the con-

<sup>1</sup> Crowley vs. Sullivan, 9 O. L. R. 27 (1904).

trary. If a total failure of consideration is proved, and the plaintiff and defendant are immediate parties, the defence is good, or if they are remote parties it is good, if value has not been given for the bill. A total failure of consideration is in its effects like an original want of consideration. There would be a total failure of consideration where a person undertook to sell a certain thing to another, and it turned out that he had absolutely no title to the thing. It has been held that where a note was given for logs, on condition that no claim should be made for the logs, and they were revendicated (that is, seized at the instance of the owner for non-payment, etc.), there was a total failure of consideration, and the note became null. There may be only partial failure of consideration. It is probable that in most of the provinces, partial failure may be set up as a defence to the extent of the consideration that is lacking.

**4. *Illegality.***—Whether the consideration be illegal in whole or in part, the bill is none the less altogether void. Considerations are said to be illegal which violate the rules of morality, are prohibited by law, or are contrary to public policy. Nor will the illegality be cured by renewing or by substituting a new instrument for the old. Thus an agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a note. A note given to raise money for corrupt purposes at an election where the maker was a candidate, is null. The plaintiff cannot recover on a promissory

note given by the proprietor of a bucketshop, in settlement of speculative transactions between them.<sup>1</sup>

**5. Release, renunciation or payment.**—A bill is discharged by payment by or on behalf of the drawee or indorser. Payment in due course means payment made, at or after maturity of the bill, to the holder thereof, in good faith, and without notice that his title to the bill is defective. Payment is what the holder accepts or recognizes as such. It is the discharge of a contract to pay money; but payment need not be a payment of money: it may be a payment of goods, or any other thing which the creditor is willing to accept. But to have the effect of discharging a bill, payment must be made at or after maturity and must be made to the holder, that is, the payee, indorsee or the bearer. If an endorsement is forged or is not authorized, the bill is not discharged, and the acceptor is not released. It has been held that a renewal bill or note does not discharge the original, unless the parties have so agreed. Payment before maturity does not discharge the bill. The holder may still negotiate it. An accommodation bill is discharged if paid in due course by the party accommodated. Where the acceptor of a bill becomes the holder of it in his own right at or after maturity, the bill is discharged. When the holder of a bill, at or after its maturity, actually or unconditionally renounces his rights

<sup>1</sup> Bucketshop transactions are speculations on the rise and fall of prices of stocks where shares are not bought outright by the broker, and where there is no intention of delivery. The transactions are purely gambling transactions, and as such are prohibited in Canada.

against the acceptor, the bill is discharged. The holder may renounce the liabilities of any party to a bill before, at or after maturity. A renunciation must be in writing, however, unless the instrument is delivered up to the debtor.

6. *Discharge of persons secondarily liable.*—As we have seen, the maker of a note and the acceptor of a bill are primary debtors. Drawers and indorsers are only secondarily liable. A discharge of a debtor operates as a discharge to parties who are liable to pay only if he fails to pay. Thus if the holder discharges the maker of a note, he cannot hold the indorser, because by releasing the maker he is depriving the indorser of his chance to collect from the maker.

7. *Real defences.*—As we have already explained, real defences strike at the root of the contract. Where the contract, by reason of the minority or insanity of the maker of a note, could not be entered into, the contract on the note never existed. Thus a note given in satisfaction of a gambling contract would be void. An instrument if materially altered without the assent of all parties liable on it is voided, except as against a party who himself has made, authorized or assented to the alteration, or subsequent indorsers; but if the alteration is not apparent, a holder in due course may enforce payment of it, according to its original tenor, as tho it had not been altered. The defence of payment at or after maturity is also a real defence.

8. *Cancelation.*—A holder may convert a blank in-

dorsement into a special indorsement; he may also strike out one or more blank indorsements, in which case any indorser subsequent to one struck out is discharged. A holder or his agent may intentionally cancel a bill or note, and if the cancellation is apparent thereon it is discharged. Liability of any party liable on a bill or note may be discharged by the intentional cancellation of his signature by the holder or his agent. The usual mode of canceling a bill is to write the word "paid" or "discharged" across the bill or note. If the cancellation is made unintentionally, or under a mistake or without the authority of the holder, it is inoperative, tho the burden of proof is on the person who alleges that the cancellation was made unintentionally or under a mistake.

9. *Forgery*.—Forgery is the making of a false document, knowing it to be false, with the intention that it shall be used or acted upon as genuine, to the prejudice of any one, whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything. Signing the name of a nonexistent or fictitious person or firm with fraudulent intention has been held to be forgery. A forged signature cannot be ratified, tho where a signature is placed on an instrument without authorization, but under circumstances not amounting to a forgery, it may be ratified. Where a signature on a bill is forged, or is placed thereon without the authority of the person whose signature it purports to be, the forgery or unauthorized signature

is wholly inoperative. No right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired thru or under that signature, unless the party against whom it is sought to retain payment of the bill is precluded from setting up forgery or want of authority.

In order to protect a bank which may pay a check or bill payable to order on demand, where one or more indorsements may be forged or unauthorized, the statute provides that when a check payable to order is paid by the drawee upon a forged indorsement out of the funds of the drawer, or is paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery of the amount so paid, or any defence to a claim by the drawee for this amount, unless he, the drawer, gives notice of the forgery in writing to the drawee within one year after he has acquired notice thereof. In other words, an indorser whose signature to a check has been forged, and out of whose account the amount of the check has been paid by the bank, must make claim upon the bank at once. If he waits for one year, he has lost any right to bring action, and the check will be considered to have been paid in due course. Where a partner in a commercial firm fraudulently accepts a bill in the firm name for his private debt, the firm cannot set up a fraud against a holder for value without notice. The partner was presumed to have authority from his co-partners to do all acts connected with the partnership business. It has been held, how-

ever, that where a defendant's name was signed by his nephew, for whom he was in the habit of indorsing, and where he had acknowledged his liability and asked for time, and only denied his liability after his nephew had absconded, it was held that he could not dispute his liability.

If a bill bearing a forged or unauthorized indorsement is paid in good faith, and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf the payment is made can recover the amount paid from the person to whom it was paid, or from any indorser who indorsed subsequently to the forged or unauthorized indorsement. But notice of the indorsement being forged or unauthorized must be given to each such subsequent indorser, within a reasonable time after the person seeking to recover has acquired notice that the indorsement is forged or unauthorized.

### REVIEW

Distinguish personal defences from real or absolute defences.

What constitutes valuable consideration? What is the effect of partial or total want of consideration? When is consideration illegal?

Define payment in due course. How must payment be made to discharge a bill? What is the effect of a forged instrument? How is an accommodation bill discharged?

Who are secondarily liable and how are they discharged?

How is the cancellation of a bill accomplished? What is the effect of unintentional cancellation?

What is forgery and how does it operate as a defence? State the provisions of the statute in regard to forged checks or bills. What is the liability of a partnership on negotiable instruments? When may recovery be had on a forged instrument?

# PART IV: CONDUCT OF BUSINESS THRU REPRESENTATION

## CHAPTER XVIII

### PRINCIPAL AND AGENT

1. *Definitions and distinctions.*—Mandate has been defined as a contract by which a person, called the mandator or principal, commits a lawful business to the management of another, called the mandatory or agent, who by his acceptance obliges himself to perform it. The acceptance may be implied from the acts of the agent, and in some cases from his silence. Or again, an agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal. There are general agents and special agents.

A general agent has authority to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature; or to act in the ordinary course of his business, trade or profession as an agent, on behalf of his principal—as a solicitor, a factor, a broker.

A special agent is an agent who only has authority to do some particular act, or represent his principal in some particular transaction, such act or transaction

not being in the ordinary course of his trade, profession, or business as an agent.

A factor or commission merchant is an agent who is employed to buy or sell goods for another, either in his own name or in the name of his principal, for which he receives a compensation commonly called a commission. He is a bailee and is intrusted by his principal with the possession or control of the goods. Ordinarily he is entitled to receive payment and to give a valid and binding discharge. If his principal resides in another country, he is personally liable to third persons with whom he contracts, whether his principal's name be known or not. The principal is not liable on such contracts to third persons, unless it is proved that the credit was given to both principal and factor, or to the principal alone. He has a lien upon the goods in his hands for any balance of account in his favor. If he voluntarily relinquishes possession, his lien is lost.

A broker is an agent who exercises the trade and calling of negotiating between parties, the business of buying and selling or any other lawful transactions. He may be the mandatory of both parties and bind both by his acts in the business for which he is engaged by them. He is not intrusted with the possession or control of the goods or other property which he may have contracted to buy or sell.

An auctioneer is an agent whose ordinary course of business is to sell by public auction to the highest bidder, goods or other property of which he may or may

not have the possession or control. He sells for cash, unless he has authority to accept payment in goods or in negotiable paper, or to sell on credit. The adjudication of a thing to any person on his bid or offer, and the entry of his name in the sale book of the auctioneer, completes the sale to him and satisfies the statute of frauds, i.e., enables the auctioneer or seller to bring action without the necessity of making other written proof of the sale. Unless authorized, he cannot warrant the goods, and he cannot rescind a sale.

A *del credere* agent is a mercantile agent who, in consideration of an extra remuneration, which is called a *del credere* commission, guarantees to his principal that third persons with whom he contracts on behalf of the principal shall duly perform their contracts. In effect, he makes himself a surety for the due performance of the contract by the person with whom he deals.

2. *How constituted.*—It has already been said that agency is a contractual relation. The relation will not exist unless there is the consent, express or implied, of both principal and agent. The rule suffers exception where, in case of necessity, the relation is imposed by operation of law. So that agency will exist where there is an express appointment by a principal, or by someone duly authorized and acting on his behalf; and an express acceptance by the agent or by someone on his behalf similarly authorized. But the assent of the principal may be implied from his acts; or when another person occupies such a position

that, as a matter of common usage, he would be understood to be acting with the approval and on behalf of the principal. Thus a coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. It was held that the master was liable on the contract. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present, giving directions as to the work. It was held that the husband was liable on the orders, altho he had expressly forbidden his wife to pledge his credit, and it had been agreed between them she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement. The assent of the agent may also be implied when he so acts on behalf of another person that, in an action by the latter, he could not be heard to deny that in fact the agency existed. But where a person assumes to act for another, the consent of that other will not be implied merely because he raises no objection, unless the circumstances support a presumption that he has authorized the act.

*3. Agency by estoppel.*—Yet a person will be held as a principal toward third parties who in good faith contract with someone who is not his agent, under the belief that he is so, when by his words or conduct he

gives reasonable cause for such belief, as, for example, when by his words or conduct he represents or permits it to be represented that another is his agent. He is estopped from denying that such person is his agent, on the ground that he has really held him out to be so. The necessity for the rule is obvious. A might know that B was acting as his agent in a certain matter and be quite satisfied if B made a profit for him, but be ready to deny the fact of agency if B made a loss. That third parties in good faith may be protected, the person who holds another out as his agent in such a way, may not deny liability as a principal if reverses come.

So it has been held that no estoppel by conduct to deny an agent's authority is established on the part of the principal, merely because one of its directors, who had no particular management of the property in question, upon being shown a contract for the sale of pulp wood from the principal's land made by an agent who was employed for another purpose and for that alone, said nothing until he returned to the head office, where he lost no time in informing the other directors as to the sale, resulting in the principal's solicitors at once taking the necessary steps to protect the principal's interest.<sup>1</sup>

It has also been held that where one learns that another had without authority been purporting to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him

<sup>1</sup> B. N. A. Mining Co. vs. The Pigeon River Lumber Co., 2 D. L. R. 609.

that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority as regards obligations afterward entered into by such third person on the faith of the pretended agency.<sup>1</sup>

4. *Agency by necessity.*—Under certain conditions a person may without express authority bind another. The authority may even be denied. If a husband deserts his wife and leaves her unprovided, she may, as an agent of necessity, pledge his credit for necessaries in keeping with her station in life, as he is bound by law to provide for her. Nor may he revoke her authority in this respect. But it must be shown that the articles obtained by the wife are necessaries, and that the husband is in default to supply them. The same rule is generally applicable in the case of children. If a boy's father refuses to supply him with necessary clothing, a purchase thereof by the boy binds the father. Or if A ships a horse by railway, consigned to himself at a station on the company's line, and he has not arranged for its reception, the railway company must reasonably care for the horse, and for that purpose is an agent of necessity of the shipper. A conductor in charge of a train, in case of accident, would be an agent of necessity of the company in summoning medical assistance. The captain of a ship may be an agent of necessity to buy supplies, or even to sell the cargo.

5. *Who may be principal.*—As agency is a matter

<sup>1</sup> Ewing vs. Dominion Bank, 35 Can. S. C. R. 133.

of contract, the general rule is that any person who has capacity to contract has capacity to enter into an agency agreement.. Hence an infant or a lunatic may be held bound under a contract entered into with his authority by his agent, if under the circumstances he would be bound had he himself made the contract. If an insane person appoints an agent at a time when he has not been adjudged insane, and the agent was ignorant of his insanity, the appointment is binding on him. As between such a principal and third parties he will be bound where, tho at the time of the appointment of the agent he was sane, he later became insane to the knowledge of the agent but not to the knowledge of the third parties. The third parties under such circumstances are entitled to protection; but an insane person is also so entitled, and agency contracts made on his behalf by an agent with persons aware of his condition may be set aside by the insane principal, or rather, by his representatives. A person insane, or whose intellect is clouded, by reason, for instance, of a paralytic stroke, could not give a valid power of attorney, tho in a lucid interval he might.

Generally under the English law, a married woman, being separate as to property and entitled to deal with her property and affairs as freely as if she were unmarried, may act as an agent and may appoint agents by whose contracts in her behalf she will be bound. In Quebec, a married woman who executes a mandate given to her, binds the mandator, but she could

not be sued unless her husband were made a party to the action; nor would an action upon her agency contract succeed unless her husband were a party to the contract. Tho if she were a public trader, duly authorized by her husband, she could, in the course of her business, appoint an agent, in which case her husband also would be bound, if they were common as to property. If separate as to property, she may do and make alone all acts and contracts connected with the administration of her property, which might include the appointment of agents.

6. *When a business may be a principal.*—A corporation acts thru its agents, the directors, who in turn may appoint other agents for the carrying on of the company's operations. But a corporation cannot thru an agent do or accomplish any act *ultra vires* of its charter. A partnership business is carried on, as will later appear, on the basis of a reciprocal relation of principal and agent among the partners. Probably a partner may appoint an agent to perform certain of his duties, tho the consent of his co-partners would in some circumstances be necessary. In the case of an unincorporated society or association, an agent would ordinarily be appointed by the members, not by the society which lacks corporate existence, and the members who appoint him or ratify his appointment or contracts would be bound.

7. *Who may be agent.*—Bowstead states the general doctrine as follows:

All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their own behalf, are competent to contract or act as agents. Provided that the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any third person, is dependent on his capacity to contract on his own behalf: <sup>1</sup>

But a principal may appoint any person as his agent and, within the scope of the agent's authority, will be bound by his acts whether the agent is competent or not. If he appoints an infant, an insane person, a married woman, a partnership or a corporation, he is master of his choice and is bound thereby. The agent is looked upon merely as an instrument. Suppose A appoints B, who cannot read, as his agent, with authority to make and sign a contract for him. A cannot set aside the contract on the ground that B is not able to read it; he must abide by his own choice of an incompetent person.

8. *What acts may be done by an agent.*—The general rule is that a man may appoint an agent to do for him anything which he has power in his own right to do. Thus, he may appoint an agent to execute a deed, to make a contract. The appointment may be to act in all the principal's affairs, or in some particular matter; it may be limited by instructions as to the agent's conduct, or his conduct may be left to his own discretion. Tho, where he acts at his own discretion, he must none the less act according to the general usage in the business in which he is employed.

<sup>1</sup> Agency, p. 8.

While an agent can be appointed by bare words, without a writing, he cannot bind his principal in some matters, as for example by a deed, unless he is appointed by deed. But where a duty is imposed on a person by statute, or because the exercise of his special discretion, skill or knowledge is desired, an agent cannot replace him. Thus if A undertakes, because of his special knowledge of the pulp business and because of his influence, to negotiate a purchase of pulp, or the placing of a company's pulp products, he cannot delegate his powers for these purposes to an agent.

9. *Co-agents.*—When several agents are appointed for the same business, they are jointly and severally liable for each other's acts of administration, unless it is otherwise stipulated. And where they are appointed to act jointly and severally, one or more of them could execute the mandate independently of the others. But if they are appointed to act jointly, in ordinary cases they must all concur in the execution of the act, unless they are authorized to bind their principal by the decision of a majority, or of a quorum.

10. *What acts may be ratified.*—By ratification is meant the adoption by one person of the act or contract done or made in his behalf by another without his authority. The person doing the act may have had no authority or he may have exceeded his authority. When ratified, the act or contract is as valid as if performed or made by the principal himself. Hence a person may ratify any act which is not radically

void. The act or contract must be ratified as a whole and not in part. The principal cannot ratify the part that may be beneficial and reject what is not. But the person who ratified an act must be the person on whose behalf it is done; he must have existed at the time and be an ascertainable person with capacity to do the act in question, tho he need not be known in any way to the person who assumes to act as his agent.

The law concerning ratification of contracts can best be shown by concrete examples. Take, for example, the case of A, who, authorized, insures the goods of B, the policy of which B ratifies and accepts. A's contract on his behalf is thus ratified and he must pay the premium and may claim under the policy.

A purchases four diamonds from X on behalf of P, and tells X that P will pay for them. X extends the credit to P, who upon hearing of the contract ratifies it. If A loses one of the diamonds and tells P all about the contract and his loss of the one diamond, P would not be permitted to retain the three unless he paid for all. Having ratified the contract, he would be bound by the act of his agent and would have to stand the burden of the latter's negligence.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank, as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at two different times, and the bank's representative ratified the act

of such person in the second seizure and detaining of horses, and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing the horses.<sup>1</sup>

But ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a check given to the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the check.<sup>2</sup>

The S Company had sold goods to the A Company. The amount was in dispute. The A Company arranged a settlement with B, the agent of the S Company, and sent a check to the S Company for the amount, with a letter stating that it was in full settlement of their claim pursuant to the agreement made with B. The S Company cashed the check, but wrote that they did not intend to be bound by the settlement made by B, altho they would credit the amount on account. Then the S Company sued the A Company for the balance. It was held they could not recover. They could not repudiate the settlement and at the same time use the check sent in pursuance thereof. Even tho the act of B was unauthorized, retaining and using the check was a ratification.

<sup>1</sup> Thien vs. Bank of B. N. A., 4 D. L. R. 388.

<sup>2</sup> Margolis vs. Birnie, 5 D. L. R. 534.

But a person cannot ratify an unauthorized act which was done by the agent in his own name and behalf. Thus where A is authorized to buy wheat on the joint account of himself and B, with a limit as to price, and A, intending to buy on the joint account of himself and B, and expecting that B will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit, B cannot ratify the contract.<sup>1</sup>

We have said that a person may ratify any act which is not radically void. Bowstead asserts that:

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done.

As an example, he cites a case where A, an agent of a corporation, assaults B on its behalf. The corporation ratifies the assault. The corporation was held civilly liable to B for the assault.<sup>2</sup> But such cases are exceptional, and it may be laid down as a general rule that illegal acts and contracts may not be ratified. Thus, if A signs B's name to a note, intended to defraud, A has committed the crime of forgery. The signature is void *ab initio*. B cannot ratify the signature.<sup>3</sup> Tho if B, knowing of the forgery, leads a third party to believe that it is his

<sup>1</sup> Kneightly vs. Durant (1901), A. C. 240.

<sup>2</sup> Eastern Counties Ry. vs. Broom, 1851, 6 Ex. 314.

<sup>3</sup> Brook vs. Hook, 1871, L. R. 6 Ex. 89.

signature, and the third party is, as a result, induced to act upon such representation to his loss, B will not be heard to set up that the signature is a forgery if the third party sues him upon it.<sup>1</sup> In some of the American states, however, a forged signature may be ratified. But it has been held by the Supreme Court of Canada that a forgery cannot be ratified.<sup>2</sup> Ratification of a forged signature must be distinguished from that of an unauthorized signature made by the agent without intent to defraud. Such a signature, the principal may ratify.

11. *Conditions necessary for ratification.*—The person who ratifies an unauthorized act must, at the time of ratification, know all the material circumstances surrounding the act, unless he takes the risk incident to incomplete knowledge. Thus, if a bailiff wrongfully seizes and sells goods and pays the proceeds to his principal, the principal will not be bound unless he knew of the irregularity—unless he intended to assume any risk. If his agent makes a contract that is void, the principal is not held to have ratified if he is in good faith and is not aware that it is avoidable. But if an act, to be valid, must be done within a certain time, the ratification should take place also within such time, at least in so far as concerns a third party who would otherwise be prejudiced. The ratification should follow the act or contract within a reasonable time.

<sup>1</sup> McKenzie vs. British Linen Co., 1881, 6 A. C. 82 H. L.

<sup>2</sup> Merchants Bank vs. Lucas, 18 S. C. R. 704 (1890).

12. *Ratification express or implied.*—Ratification may be express or implied. It will be implied when the principal's conduct leads to the belief that he has ratified or intends to adopt or recognize the act. Where an agent exceeds his authority, even the silence or acquiescence of the principal may be sufficient evidence of his intention. If he adopts part of the act, he will be held to have adopted and ratified it in its entirety. Ordinarily, the ratification of a written contract need not be in writing; tho if an agent unauthorized executes a formal deed, the ratification should be by a deed. Directors of a company may ratify acts of agents if they have the authority to do so; otherwise the ratification of the shareholders may be sought. The shareholders may ratify acts *ultra vires* of directors if *intra vires* of the company.

13. *Scope of agent's authority.*—The nature and extent of an agent's authority to act may be defined by a formal deed or an informal writing or by oral instructions. Where an agent has had a course of dealings with third parties, the scope of his authority may be deduced therefrom; it may also be inferred from the circumstances surrounding the transaction, from the custom of trade, or the conduct of the principal himself. Thus, if A has usually or frequently employed B to purchase goods for him and has customarily ratified B's acts in this respect, B becomes his implied agent for all acts done within the apparent scope of his authority. Where the scope of the agent's authority is defined in writing, it will gen-

erally be easy to deal with him within the terms of his authority; it will be more difficult where his powers can only be inferred. In either case, in any important transaction, too careful inquiry cannot be made as to the extent of the agent's mandate.

Even where the authority is expressly given, there may be uncertainty if it is given in words of uncertain or ambiguous meaning; or if doubt arises as to the implied powers which ordinarily would be collateral to the express powers. If the authority is express, and the agent acts strictly within its terms, the principal will be bound, tho the agent may have acted with an eye to his own rather than to his principal's interest.

The apparent authority is the real authority. And where the third party had knowledge of the terms of the agent's special authority, he will not be able to hold the principal for the acts of the agent which exceed such authority. If the authority is inferred from a course of dealings or the conduct of the principal, then the liability of the principal toward third persons will be based upon the extent of the agent's usual or customary authority. Innocent third persons are entitled to deal with an agent so accredited where he acts within the seeming course of such employment. Hence the rule that one partner may bind his co-partners in all acts done in the usual course of the partnership business. Thus, also, if A sends B with ready money to buy certain goods, and B gets the goods and charges them to A, A is not bound.

But if A is in the habit of dealing on "tick" with C, and B buys goods from C for himself and charges them to A, A will be bound, if C is in good faith. Or if A allows his clerk B, as a general rule and in the course of business, to accept drafts or indorse notes, and B does so on an occasion and does not account for the money, A may be held liable.

**14. *General and special agent.***—A principal may attempt to restrict by private instructions the actions of a general agent, i.e., an agent appointed by the principal to transact all his business of a particular kind. The agent may exceed these instructions, and yet, as towards third parties treating with him as a general agent, bind his principal. As Lord Blackburn has said:

Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing, in order to prove what was the scope of the agent's authority.<sup>1</sup>

But if the agent is a particular agent, employed for one special act or transaction, then the third party must be careful to discover the exact extent of the agent's authority. Even the general agent, with the wide powers which the term implies, must act according to the custom of trade or the usage of the particular business. Any departure therefrom will be

<sup>1</sup> National Bolivian Navigation Co. vs. Wilson (1880), 5 A. C. 176.

sufficient to put the third party on his guard. Thus, a broker is supposed to sell stock for cash. If he is authorized to sell shares for a client, he cannot sell on credit, unless the authorization so provides. Yet a principal can scarcely object where an agent executes his mandate in a manner more advantageous to him than that specified, and in such case the agent will not be held to have exceeded his powers.

15. *Authority in ambiguous terms.*—If an agent's instructions fairly admit of more than one interpretation, and he in good faith adopts one or the other of them, the principal will be bound—tho he may not have intended the construction which has been acted upon. Thus, where an agent is instructed to dispose of fifty shares of stock at one hundred dollars a share, or over, he is entitled to sell at one hundred dollars, tho the market price may be rising. It has also been held by the House of Lords that where an agent was authorized to buy and ship five hundred tons of sugar, and he was told that if he could secure a suitable vessel, fifty tons more or less did not matter, he had fairly and properly executed his mandate by securing a shipment of four hundred tons.<sup>1</sup>

16. *Power of attorney.*—Where an agent acts under special written authority, he is said to act under "power of attorney." The writing may be signed before a notary under seal, or may be executed before witnesses. Its terms will be strictly interpreted to

<sup>1</sup> Ireland vs. Livingston (1872), L. R. 5 H. L. 395.

include only the powers mentioned and those which are an essential corollary thereof.

The following is a form of power of attorney which might be adopted by a financial firm when giving a power of attorney to one of its branch managers, and of course the form could be altered to provide for any action on the part of the agent. This is a general, rather than a special power of attorney.

KNOW ALL MEN BY THESE PRESENTS, that we, ARNOLD SEVERN AND JAMES McDONALD, carrying on business together in co-partnership in Montreal and elsewhere under the firm name and style of SEVERN & McDONALD.

Have made, ordained, deputed, constituted, and by these presents do make, ordain, depute, constitute and appoint,

GEORGE A. BENNETT, of the City and District of Montreal, Manager.

To be our true and lawful attorney, for us and in our name:

To take the complete charge and management of the Montreal office of the constituents, and to do, transact, manage and carry on all and every trade, business, transactions and affairs of them, the said constituents, in connection therewith;

To make, draw, sign, accept, transfer and indorse, negotiate, pledge, retire, pay or satisfy all Promissory Notes, Bills of Exchange, Drafts, Checks and Orders for payment or delivery of money and securities; to pay and receive all moneys, to give acquittance for the same; to arrange, balance and settle all books, accounts and dealings; to sign script, indorse certificates, negotiate, obtain and sign loans, either alone or jointly with others, and deposit and hypothecate stocks, bonds and other securities to guarantee and secure such loans and advances from time to time; to draw

on the account of the undersigned with the Bank hereinafter named, and to overdraw the same if he shall think fit; to guarantee the indorsements and checks of customers; to buy, sell, transfer, accept transfer of, assign and otherwise deal with, for and on behalf of the constituents, all stocks (including the stocks of banks), bonds, debentures and debenture stock and other securities; and further to manage and transact all manner of business whatsoever with the Bank of ..... , or with its Manager, or other Officer duly authorized, the whole as amply and effectually to all intents and purposes as they the said constituents could do or have done in their own proper person if these presents had not been made—the said constituents hereby relieving the said Bank from the responsibility, whether in law or in equity, in connection with the disposal of moneys paid or advanced to the said Attorney under these presents, and from any inquiry and investigation as to the purpose for which such money is required, or with regard to any transaction connected in any way with such payment or advance;

To ask, demand, sue for, recover and receive, of and from all and every person or persons, and to arbitrate, adjust, compound and settle all and every such sum and sums of money, debts, rents, goods and chattels, dues, duties, claims and demands whatsoever, as now are or hereafter shall become due, owing, belonging or payable to the constituents, and for and in their name and on their behalf to give proper receipts, acquittances and discharges for same respectively, as to the said Attorney may seem just;

To constitute and appoint, and in his place and stead, to put one or more Attorney or Attorneys, and such appointment or appointments again at his pleasure to revoke, and other or others in his or their place to substitute;

The said constituents ratifying and confirming, and promising and agreeing to ratify and confirm, all and whatsoever their said Attorney or his substitute or substitutes in and about the premises shall lawfully do or cause to be done by virtue of these presents.

This letter of Attorney shall be and remain in full force

and effect until the said constituents shall have duly notified in writing the said Bank, or such other person or persons to whom these presents may come, that they, the said constituents, have revoked the same, and the receipt of such notice shall have been acknowledged.

IN WITNESS WHEREOF, we, the said constituents, have hereunto set our hands and seals, this      day of      , in the year of our Lord one thousand nine hundred and      , at Montreal, in the Province of Quebec.

Signed, Sealed and Delivered  
by \_\_\_\_\_ one  
of the constituents, in the  
presence of:

Per:

**17. *Implied powers.***—The agent, as was hinted in the preceding section, has implied authority to do what may be necessary or incidental to the due and effective execution of his mandate; and in so doing will bind his principal. Thus, if an agent is employed to go thru the country and sell goods, he has implied authority to hire a carriage to get to stations or to customers. If by careless driving he causes an injury to horse or carriage, his principal will be bound towards the owner thereof. A person who is authorized to buy goods for his firm, has implied authority to pay for them and to give receipts, and also to arrange discounts. But it has been held that where an agent is instructed to find a purchaser and to make a contract for the sale of a house, his duty ends there, and he has no implied authority to receive the purchase money. A lawyer authorized to sue upon a note has implied authority to take payment and give a discharge. But an agent who is intrusted with goods

which he is to sell, cannot pledge them under any implied authority. The general rule to be observed is that acts done by way of implied authority in connection with either a special or a general mandate, must be not only incidental to, but in accordance with, the usage or custom of the particular business. Thus, an insurance broker who is authorized to issue a policy, has no authority to cancel the contract on the policy: his ordinary duty as a broker is to make contracts of insurance, and not to cancel them, once they are validly entered upon. As to an agent's authority implied from special customs, Bowstead says:

Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market or business in which he is employed. Provided that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority, or to act in accordance with any usage or custom which is unlawful. The question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular, a usage or custom which changes the intrinsic character of the contract of agency, or a usage or custom whereby an agent who is authorized to receive payment of money may receive payment by way of set-off, or by way of a settlement of accounts between himself and the person from whom he is authorized to receive payment, is unreasonable.

**18. *Must execute accepted mandate.***—To the extent of the powers and authority given to him, the agent must execute his mandate. That is his con-

tract, whether the authorization be expressed or implied, tho he is not obliged to carry obedience to the point of committing a fraud or some wrongful or unlawful act. He can refuse to be made merely an instrument for wrongdoing. Strict performance will be exacted where he is paid for his work. If the mandate is gratuitous, however, the courts will, as may appear just in the circumstances, moderate the rigor of the liability arising even from his negligence or fault—for it must be understood that an agent, who thru his negligence or fault in executing his mandate causes loss to his principal, will be held liable for such loss. Apparently, tho, where an agent undertakes to do a thing gratuitously and does not do it, he will not be liable for his mere non-performance.

*19. Delegation of agent's authority to a sub-agent.*—The fundamental rule is that an agent, who in theory is employed because of his special skill, knowledge, reputation or influence, must carry out in person the mandate which he has accepted, unless he has express or implied authority to the contrary. He is appointed because the principal has confidence in him and his peculiar ability. So where he is appointed to act under circumstances which require the exercise of discretion, for example, he may not, as a general rule, appoint anyone else to exercise that discretion in his place. Thus a broker, an auctioneer, the liquidator or the directors of a company must ordinarily carry out their mandate in person.

The rule, like other rules, suffers exception.

Where expressly or impliedly an agent has undertaken to carry out a mandate in person, he cannot delegate his authority; but in other cases his right to do so may be implied. Many forms of agency, especially mercantile agencies, cannot be carried out by the agent in person, and it is not intended that they should be. So it has been laid down in a leading case, that:

The exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a "sub-agent" or "substitute"; and, on the other hand, to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise, which impose upon the agent the necessity of employing a substitute.<sup>1</sup>

In other words, the principal may know when he appoints an agent that the latter will employ substitutes; or it may be the custom or usage of the trade or business that sub-agents should be engaged; or the act or duty may be performed without the exercise of any particular skill or discretion—in these, and under

<sup>1</sup> DeBussche vs. Alt. (1878), 8 Ch. D. 310.

many other circumstances, the agent is free to employ others to fulfill his contract for him.

**20. *Relations of agent, sub-agent and principal.***—The authorities are somewhat at variance in ruling upon these relations, and the Quebec law differs in details from the English law. It may be said, however, that where an agent appoints a sub-agent, without the express or implied authority of the principal, the latter will not be bound by the acts of such sub-agent. On the other hand, the agent is answerable for the acts of the person whom he, without authorization, substitutes for himself. In an English case, an agent was held liable for the acts of his sub-agent who was appointed with the principal's knowledge.<sup>1</sup> Certainly he would be liable where, being authorized to appoint an unnamed substitute, he appointed someone who was notoriously unfit.

**21. *Duties of agent.***—An agent should act with all the skill, care and diligence that could reasonably be expected of anyone engaged in his particular business. There are well recognized standards of conduct and performance in most callings, and to these he will be expected to adhere; more especially when he is being paid for his services. If he is acting gratuitously, the rigor of the rule is somewhat relaxed, and such skill and diligence as he possesses will be exacted or which he would exercise in the conduct of his own affairs. He is bound to keep his principal's money and property separate and intact, to

<sup>1</sup> Skinner vs. Weguelin, 1882, 1 C. & E. 12.

keep and render accounts of his administration, to keep proper books and vouchers, and to deliver and pay to his principal all that he has received under the authority of his mandate. He must pay interest upon such money of his principal as he employs for his own use.

22. *Fiduciary obligations.*—As we have already seen, an agent stands in a relation of confidence toward his principal; and from a person in a position of confidence is always exacted the utmost good faith and fair dealing. He cannot act for both parties to a transaction and accept a commission from each without their full knowledge and consent. Otherwise the interests of one or the other are likely to be in jeopardy; and an agent, owing to his position of trust, must not and cannot place himself in the way of temptation. If he is instructed to sell a property, he may not himself become the purchaser—at least before he has obtained the consent, based upon as full knowledge of the facts as he has himself, of his principal, who otherwise could repudiate the transaction as irregular.

Nor could an agent authorized to buy a certain property for his principal be himself the vendor, unless again after full disclosure. His profit would be secret and illegal; and the transaction could be set aside by the principal tho he had not thereby lost a cent. So also where an agent, authorized, for example, to buy one thousand bushels of wheat, stipulates with the vendor for a profit in consideration of

his getting the sale in preference to another, such a profit is in the nature of a bribe, and the principal may repudiate the contract of purchase. Perhaps the reasoning behind the rule is that, if the vendor can afford to give a secret bribe to the agent, he can afford to sell just so much cheaper to the principal, who under the circumstances is entitled to any shading of prices. Again if an agent is employed to buy a property and he purchases for himself, he is regarded as a trustee for his principal: he cannot set up any title so acquired against the absolute right of the principal to have the mandate fulfilled.

The courts are very strict in refusing to countenance any act of an agent which conflicts, however slightly, with his position of trust. For example, where *T*, while professing to act as *M*'s agent and stipulating for a commission, by a devious course of conduct, took from *M* an agreement of sale to himself *T*, of certain land, resold it to *G*, at a price higher than that at which he represented to *M* that he had sold it, paid over to *M* a smaller sum, less the agreed commission, and divided the balance with *A*, who was alleged to have been his partner in the transaction. It was held that *M* was entitled to recover, not only the profit made by *T* including the commission, but the amount paid to *A*. All moneys paid by *G* to *T* were received by *T* in trust for his principal, *M*.<sup>1</sup>

Similarly, a secret arrangement between the re-

<sup>1</sup> *Morison vs. Thompson*, L. R. 9 Q. B. 480.

spective agents of the vendor and the purchaser of property, that a price larger than that which the vendor is willing to accept shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be countenanced by the court, and the purchaser, having paid the full price demanded, without knowledge of the secret arrangement, is entitled to recover such surplus.<sup>1</sup>

A principal must refund to the party with whom his agent contracted on his behalf any profit in the transaction represented by the money he has received thru the fraud of his agent, whether the principal authorized the fraud or not.<sup>2</sup>

**23. *Liability of agent to principal.***—An agent is only an instrument and represents another. As toward his principal he incurs no personal liability whatever be his due and proper execution of the mandate. The third person with whom he dealt may not fulfil his contract, may become insolvent or repudiate his agreement—that is no affair of the agent. By common usage, of course, an insurance broker is liable to an insurance company for premiums payable upon policies written by him; and a *del credere* agent, from the nature of his contract, guarantees fulfilment of the transaction which is the subject of his agency.

But an agent will in all cases be liable to his principal for the damages resulting from his negligence or carelessness, his unauthorized acts or other breach of duty.

<sup>1</sup> Peacock vs. Crane, 3 D. L. R. 645.

<sup>2</sup> Canadian Financiers, Ltd., vs. Hong Wo, 1 D. L. R. 38.

Hence, in an action on a fire insurance policy, the insurer may recover from its agent (as damages for the latter's neglect of duty as the insurer's agent, to give the insurer sufficient information of the hazardous nature of the risk, resulting in too small a premium being charged) the difference between the accustomed premium which would have been charged on a proper discovery of the material facts known to the agent, and the lower premium which was in fact charged upon his negligent classification of the risk.<sup>1</sup>

A person was employed to secure additional insurance on a certain property. A correct specification of what was required was given to him. He received the policy from the underwriters and forwarded it to his clients without reading it. The policy contained an erroneous statement of the prior insurance carried by them. As a result, when a fire occurred, they were forced to compromise their claim against the insurer. It was held that the agent was liable for the damages suffered by them.<sup>2</sup>

And again, if an agent neglects to keep his principal's money separate from his own, and, in fact, deposits it in his private account at his bank, and the bank fails, the agent has been held liable.<sup>3</sup>

And an auctioneer who sells property under conditions requiring the payment of an immediate deposit, has been held liable in an action for negligence if he

<sup>1</sup> *Stoness vs. Anglo-American Insee. Co.*, 3 D. L. R. 63.

<sup>2</sup> *Rudd Paper Box Co. vs. Rice*, 3 D. L. R. 253.

<sup>3</sup> *Wren vs. Kirton* (1805), 11 Ves. 377.

permits the highest bidder to go away without paying the deposit.<sup>1</sup>

An agent will not be liable where he has done an authorized act which in itself may be imprudent and which may result disastrously to the principal. Nor will he be liable where damage results from his actions when he has literally followed his instructions; or where, in the absence of instructions, he has exercised his best judgment and was entitled to use his discretion, or has acted under the best obtainable advice or according to the usage of the particular business. If on his premises a principal orders work to be done lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, the principal himself is bound to see to the doing of that which is necessary to prevent the mischief. He cannot relieve himself of his own responsibility by employing someone else (whether servant or independent contractor) to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.<sup>2</sup>

It has been held that an agent who had no authority to bind an insurance company, until it had approved an application for insurance, is not liable for failure to effect insurance upon property before it was destroyed by fire, where he agreed with the applicant

<sup>1</sup> Hibbert vs. Bayley, 1860, 2 F. & F. 48.

<sup>2</sup> Cockshutt Plow Co., Ltd., vs. MacDonald, 8 D. L. R. 112.

only to submit his application to the company for approval, which he did without negligence, and it did not appear that he unconditionally agreed to place and effect such insurance.<sup>1</sup>

A gratuitous agent is liable for gross negligence in the course of his agency, but not for mere want of skill, unless he is in a situation from which skill may be implied. But an omission to exercise such skill as he actually possesses or has held himself out to possess, or such skill as may reasonably be implied from his profession or employment, or to exercise such skill and diligence as he is in the habit of exercising in regard to his own affairs, is deemed to be gross negligence for the consequences of which he is responsible to the principal.<sup>2</sup> So that where a customer deposited certain securities with his bankers for safe keeping, the bankers receiving no reward for taking care of them, and the securities were stolen by a clerk in the banker's employ, it was held that as the bankers acted gratuitously, they were not liable, as there was no evidence of gross negligence on their part.

**24. *Measure of damages.***—Where by his negligence or some other breach of duty an agent causes loss to his principal, the latter's claim against him will be for the amount of the actual loss sustained, i.e., such loss as would naturally result, or such as the agent, in the circumstances, might reasonably have known and expected would result. Hence, if an agent

<sup>1</sup> *Baxter vs. Jones* (1903), 6 O. L. R. 360.

<sup>2</sup> *Wilson vs. Brett* (1843), 11 M. & W. 113.

employed to insure his principal's goods neglects to do so, and they are destroyed by fire, he will be just as liable as the underwriters would have been had he effected the insurance. In another case, a commission agent in Hong Kong was instructed to buy a quantity of a certain kind of opium. He bought and shipped an inferior kind. It was held that the proper measure of damages was the loss actually sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the kind ordered and of that shipped.<sup>1</sup>

*25. Agent not liable on agency contracts.*—An agent who acts in the name of his principal and within the bounds of his mandate, is not personally liable to third persons with whom he contracts. When we speak of an agent acting within the bounds of his mandate, we include, of course, acts in excess of his authority which the principal ratifies. If he contracts personally, tho on behalf of his principal, he may be sued in his own name, tho the principal may be known to the third person contracting. So it has been held that where an agent buys goods at a sale by auction, and gives his own name which is entered as that of the buyer he is liable, unless it is clearly proved that to the knowledge of the auctioneer he did not intend to bind himself. In such a case, it is proved that he did not "contract personally." But where an agent acts for an undisclosed principal, he is,

<sup>1</sup> Cassaboglou vs. Gibb, 1882, 11 Q. B. D. 797.

in all cases, personally liable. He will even be liable for damages for non-performance of his contract. His offer to disclose his principal later will not help him. So that if an auctioneer, acting for an undisclosed principal, sold a potato crop still in the earth, to be removed at the expense of the buyer, he would be held to have contracted to give authority to enter the field for the purpose of digging and removing the potatoes. He would also be considered to have warranted that he had authority to sell.

It follows that if an agent makes a contract with a third party ostensibly on behalf of his principal, but in reality beyond the scope of his authority, he is in the position of having warranted to such third person that he had the authority he seemed to have. If he had not such authority, then he has deceived the third person and has committed a breach of warranty for which he may be sued. If he wilfully misrepresents facts regarding the thing or matters which are the subject of his agency, he has deceived and is liable in damages. If he knowingly declares himself to be and acts as the agent of a non-existent or incompetent person, he will be personally liable. There is no cause of action for breach of implied warranty where there is no misrepresentation of the fact of authority, e.g., where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal.<sup>1</sup>

<sup>1</sup> Smith's Mercantile Law, 11th Ed., p. 191.

But when, in the course of his agency, he signs a deed in his own name, thus becoming a party thereto, tho he may be described as representing a principal who is named, he will be personally liable. If the principal is undisclosed, not only will he be personally liable, but he alone could sue the other party thereto to enforce the contract, on the principle that a person who is neither a party to a deed nor mentioned therein, cannot sue upon it.<sup>1</sup> So also when a person makes a contract, professedly as agent but actually for himself as principal, he is personally liable.

An agent will be bound to repay money to a third person where it has been paid to him for the use of his principal, and (1) the agent has contracted personally and the credit is not given exclusively to the principal or (2) the agent has obtained payment by fraud or threat or (3) the agent, having had payment but before delivery to his principal, is notified by the third party that the latter intends to demand repayment because of error, fraud, threats, and so on.<sup>2</sup>

*26. Actions by agents.*—The general rule is that an agent cannot sue on a contract made professedly on behalf of a principal. There are certain exceptions to the rule. Naturally where he contracts personally, or on behalf of an undisclosed principal, he may sue in person. But a factor, who according to our definition has a special property in the subject matter of

<sup>1</sup> Thomson vs. Playfair, 2 D. L. R. 37.

<sup>2</sup> Bowstead, Loc. Cit., 421-2.

the agency, in that he has a lien for any balance due him on the price of goods sold by him, may personally sue therefor. Generally speaking, he will also be liable to third persons when his principal resides in a foreign country. It has been held that both a factor and an auctioneer may sue personally for the price of goods sold by them for their principals. If an agent has paid away his principal's money by error, he may sue in his own name to recover. Or he may sue in damages anyone who causes injury to the goods of his principal which are in his possession. In such cases the agents sue as trustees for their principals. But it has been held (and rightly so) that an agent cannot sue to recover money promised him by a third person as a bribe, tho he may not have been influenced in any respect thereby.<sup>1</sup>

**27. Remuneration of agent.**—The chief right of an agent against his principal is to receive his remuneration or commission. The amount to which he is entitled depends upon the express or implied contract between himself and his principal. Where there is no express contract, an implied contract will be sought in the custom or usage of the particular trade or business entered upon, from the circumstances surrounding the employment or from the conduct of the principal. In the absence of custom or usage, according to the English rule, it is said that there is an implied contract to pay reasonable remuneration.<sup>2</sup> The Que-

<sup>1</sup> Harrington vs. Victoria Dock Co. (1878), 3 Q. B. D. 54.

<sup>2</sup> Bowstead, Agency, p. 192.

bec rule is embodied in an article which provides that the mandate is gratuitous unless there is an agreement or an established usage to the contrary.<sup>1</sup> Where an agent has carried out his instructions and has, say, brought a purchaser to the vendor, his principal, and the principal then does not complete the sale, it has been held that the agent is entitled to his commission. But he will not be entitled to commission, in the absence of a special contract to that effect, where the precise event which his services were sought to bring about has not resulted therefrom. And where by express contract a commission has been named, no implied contract based on custom or usage can be urged against the express contract. Thus, if an agent, A, contracts with a wholesale drygoods firm that he shall receive a commission of five per cent on "all sales effected or orders executed by him," it has been held that if one or more purchasers become insolvent before payment, he is entitled to his commission tho it may be the custom of the trade that an agent will not receive commission in respect of bad debts. If the principal revokes the appointment he pays no commission, tho the agent is entitled to be indemnified for his labor and expense. So it has been held that where all that a real estate broker, who had an exclusive right to sell property, did toward making a sale was to advertise it in a newspaper before the owner effected a sale thereof, the agency was revoked, and the agent could recover only for the services actually

<sup>1</sup> Civil Code, Article 1702.

performed, and not the compensation agreed upon in case he should make a sale.<sup>1</sup>

In the absence of a contrary agreement, an agent is entitled to commission only on the transaction which he brings about—he cannot extend his right to some subsequent transaction. Thus, if an agent is authorized to find a lessee of a house and he does so, he receives his commission; if the tenant later buys the house, the agent cannot claim a commission on the sale. The sale does not arise directly from his agency.

Under certain circumstances, also, the agent may be deprived of his commission. If he has been employed for an illegal purpose, he can claim no reward; or if he has been guilty of misconduct—bad faith or fraud,—or if he has been grossly negligent and as a result his employer receives no benefit thru his agency, or if he betrays his trust and acts against his principal.

*28. Agent's right to indemnity.*—A principal must indemnify his agent for all obligations contracted by him toward third persons, within the limit of his powers, or even where he has exceeded his powers and his acts have been ratified. The principal must likewise reimburse the expenses and charges which the agent has incurred in the execution of the mandate. This is true even where, without fault on the part of the agent, the business undertaken does not turn out successfully. An agent is also entitled to receive repayment of all advances he has made on behalf of the principal in the regular course of employment. Such

<sup>1</sup> Cadwell vs. Stephenson, 3 D. L. R. 759.

advances the principal is presumed to have asked him to make.

The principal's request may be inferred, where the advances are made in the *regular course of trade*, or even on the spur of some pressing exigency not provided for by any ordinary rule, since the employer may fairly be taken to have authorized the employe to do, under any circumstances, that which a prudent man would conceive necessary for the safeguard of his interests, e.g., to insure a cargo, which is in extraordinary danger on account of the lateness of the season. But if an agent think fit to make a payment out of the regular course of business, he will not, unless he can show circumstances from which his principal's authority may be inferred, or his principal adopts it, be entitled to repayment. Moreover, tho he is entitled to be repaid his regular expenses, yet if he conduct himself so negligently as to incur expenses which would not have been necessary had he acted rightly, he will be allowed nothing on account of them.

Upon proper advances made by the agent the principal must pay interest. The principal must also indemnify the agent who is not in fault for losses caused him by the execution of the mandate, but not for losses caused by his disobedience or negligence. Hence if A authorizes an insurance broker, B, to execute a policy of fire insurance, and he revokes B's authority before the contract is completed, but B goes ahead, has the contract completed and pays the premium, he cannot recover the premium from A, because he has acted without authority. But where an agent, in ignorance of the extinction of his mandate by the death of his principal, or for other cause, continues the execution of his mandate, he must be indemnified, for all such

acts as are within his powers, by the principal or his legal representatives.

29. *Lien of agents.*—As we have seen, the principal is bound to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and to pay him the salary or other compensation to which he may be entitled. To secure payment, the agent has a privilege and right of preference, a lien, for the payment of what is due him, upon the things placed in his hands and upon the proceeds of the sale or disposal thereof. There are certain conditions to the existence of his lien—he must have obtained possession lawfully in the course of the agency; there must be no agreement adverse to his right; he must not have received the goods for a purpose or under instructions incompatible with a right of lien. Such a lien is known as a possessory lien—which means that the agent has a right to retain the property until his claim has been satisfied. But the fact that he exercises his right of lien does not prevent his taking action upon the debt. In such case, he holds the goods which are under lien as a collateral security.<sup>1</sup> He may lose his lien by parting voluntarily with the goods, unless he is fraudulently induced to give up possession, or unless he gets an agreement that tho he parts with the goods his lien continues in force. By contract, express or implied, he may waive his lien.

30. *Acts performed within the powers of the mandate.*—The general rule is that the principal is bound

<sup>1</sup> Smith: Mercantile Law, Ed. 1905, p. 766.

in favor of third persons for all the acts of his agent, done in execution and within the powers of the mandate. In particular instances—as in the case of a factor whose principal resides in a foreign country, or in case of an agreement or of the usage of trade—the agent may alone be bound for his acts, but these cases are exceptional. So that where the agent acts strictly within the scope of his authority, he binds his principal toward third persons who deal with him in good faith, even tho he may have acted adversely to his principal's interests. So if A is authorized in writing by B to buy and sell cheese, and A buys a large quantity of cheese in his principal's name from C, sells it and pockets the proceeds without paying C, B will be held toward C, because, tho A acted fraudulently, he was, so far as C knew, acting strictly within his actual authority. Tho C must be in good faith, it is not required of him, in the presence of such an express authority, to go behind it to discover whether the agent is buying for himself or for his principal. The apparent authority is the real authority.

Similarly, every act which an agent does in the course of his employment, and within the apparent scope of his authority, is binding upon the principal. But the agent must not actually be unauthorized, to the knowledge of the third person, to do the act. If the third person knows that the agent is exceeding his authority, he will not be allowed to take advantage of the principal. Thus the general manager of an amusement company engages a hall and orders the

printing of advertising matter in preparation for the appearance of a foreign orchestra. The regulations of the company provide that all transactions shall be for cash. The company is liable, unless the third person had notice that the manager acted beyond his authority. His acts were within the apparent scope of his authority as general manager. The test is, then, that the extent of the agent's authority is (as between his principal and third persons) to be measured by the extent of his usual employment—by employing him the principal holds him out as his representative for the matter of the employment, and third persons in good faith are entitled to treat with him in connection with matters in the usual course of such employment. So it has been held that where the manager of a business which was carried on in his name, the real principal being undisclosed, ordered goods for the business, and in so doing exceeded his authority, the undisclosed principal was bound.<sup>1</sup>

*31. Acts exceeding the scope of authority.*—For such acts the principal is not bound, unless he has authorized or ratified them. What acts are, or are not within the scope of the agent's authority or in the course of his employment, will have to be determined in each case. The courts will generally hold that an agent may adopt measures necessary or usual for carrying the main intention of the principal into effect.<sup>2</sup> Thus it has been held that an agent who is

<sup>1</sup> *Watteau vs. Fenwick* (1893), 1 Q. B. 346.

<sup>2</sup> *Smith*, Loc. Cit. 160.

employed to get a bill discounted, may, perhaps, unless expressly restricted, indorse it in the name of his employer; that an agent appointed to receive rents and make leases can fix the period of the lease, and that a broker who is employed to issue a policy of insurance may settle the loss. On the other hand, it has been held that a bank is not bound where one of its managers, without authority, guarantees payment of a draft, it not being within the ordinary scope of his authority to do so. Nor is a principal bound who instructed an agent to find a tenant for a property but not to grant a lease without consulting him, where, without consulting him, the agent granted a lease for twelve years.

The principal is not bound toward third persons who deal with an agent who to their knowledge is exceeding his authority. Thus a broker has possession of certain goods upon which he has a lien for advances. He pledges the goods to a person who knows that in so doing he is exceeding his authority. The pledgee acquires no right; he cannot even retain the goods for the amount of the broker's lien, the lien not having been transferred under the circumstances.

**32. *Termination of agency.***—The relation of principal and agent arises from contract, express or implied. The relation is terminated as other contracts are terminated, thus:

(a) By the accomplishment of the particular business or transaction. If a solicitor is retained to conduct a case, unless it is otherwise agreed, his man-

date ceases upon the rendering of the judgment. An auctioneer is instructed to sell certain goods; on the completion of the sale his authority ceases.

(b) By the expiration of the time for which the mandate is given. This may depend upon the terms of the contract. It may depend upon usage or the custom of trade. Thus a broker is authorized to sell certain goods. By the custom of trade his authority to sell may lapse with the expiry of the day during which the order is given.

(c) By the destruction of the subject matter of the agency.

(d) By the happening of some event which renders the agency unlawful, or upon the happening of which it has been agreed the authority shall cease.

(e) By notice of revocation given by the principal to the agent, subject to the agent's right to damages in case of breach of contract.

(f) By notice of renunciation given by the agent to the principal. The agent may be liable for damages if his renunciation is unjustifiable.

(g) By the death of the principal or of the agent.

(h) By some change in the condition of either party by which his capacity is affected, as by lunacy, unsoundness of mind, interdiction, bankruptcy, or, where the principal is a corporation or company, by the dissolution of the corporation or company.

It may be stated as a general rule, that acts of the agent done in ignorance of the death of the principal or of any other cause whereby the mandate is extin-

guished, are valid. Nor does a revocation by the principal affect third parties who may deal with the agent in good faith, without notice that the agent's authority has ceased.

### REVIEW

What is an agent? Distinguish between special and general agents? What is a factor and what are his relations to the principal? Explain the status of a broker. Define an auctioneer; a *del credere* agent.

What is necessary to constitute the relation of principal and agent? How may the consent be applied?

Discuss agency by estoppel; agency by necessity.

Who may be principal in an agency agreement?

Who may be an agent and what acts may be done by him?

Describe ratification and conditions which must exist for ratification. Distinguish between express and implied ratification.

Discuss the scope of an agent's authority.

What are some implied powers of an agent?

Discuss the fiduciary obligations between an agent and his principal.

For what is an agent liable to his principal?

Name the ways in which an agency may be terminated.

## CHAPTER XIX

### MASTER AND SERVANT

**1. Definition.**—The relations between master and servant are in many respects similar to those between principal and agent. Frequently the words “servant” and “agent” are used interchangeably. Strictly speaking, they are not interchangeable; tho every servant is, in executing the duties required of him under his contract with his master, the agent of his master. An agent is a person authorized to do some act or acts in the name of another who is his principal. He acts for and represents his principal in dealings with third parties where obligations are created between the principal and such third parties.

A servant, while he is acting as a servant only, and not as an agent, performs operative acts, menial labor, office work, and so on, in the performance of which he does not come into contact with third persons in a representative capacity. My coachman, in the performance of his usual duties as such, is my servant, and not my agent. But if I send him to buy a horse for me in my name, he becomes my agent for that purpose, tho he is none the less my servant. So that a person may be both an agent and a servant at the same time. It is said that in order that there may be a *contract* of hiring and service there must be a mu-

tual agreement, express or implied, by which one person is bound to hire and remunerate and another is bound to serve for some determinate time. There will be no *contract* of hire and service if the understanding is that the employer is to pay only while the servant remains, it being optional whether the servant will serve or the master employ.

2. *Contract of hire and service*.—If a special agreement is entered into, then the terms of the agreement must be observed and adhered to by both master and servant. Where the agreement calls for service for a year or longer, generally it must be in writing and signed by the parties. But a binding agreement of service cannot be made for a longer period than nine years. It has been held that where services have been rendered without an express contract to pay for them, it is a question of fact whether or not there was an implied contract to pay for them, and the onus is upon the one seeking payment. Usually, however, where there is no express contract for hire and service, and the service is performed, there arises a presumption of contract, in which case the wage would be the customary wage paid for the particular kind of work in the locality. Where the services are rendered in such a case as between near relatives, the presumption is rather to the contrary. It then becomes necessary to prove an express hiring.

3. *Independent contractor*.—In order to be an independent contractor, a workman must be free from

control, and must not be subject to the orders of any-one as to the manner in which the work is to be done. A wishes to have a building torn down to make way for a new one. He contracts that B shall tear down the building, take full control of the work, employ his own men and use his own methods. B is experienced in this kind of work, and A exercises no control or supervision. The work begins, and owing to the removal of parts of the roof which formed a counterweight for a heavy stone cornice, a part of the cornice falls into the street and kills a passerby. A is not responsible; B is, if negligence on his part is proved. If B had not been a competent person, and had not had experience in this class of work, A might be held liable for his negligence in employing an incompetent workman. If after the work began, and before the accident, A had intervened and the work was henceforth done under their joint supervision, then the accident would be considered to have occurred thru the negligence of both.<sup>1</sup>

So it has been held that the act of committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, is to be differentiated from the act of turning over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. It may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting

<sup>1</sup> *Dallontania vs. McCormick and the C. P. Ry.*, 4 O. W. N. 547, 8 D. L. R. 757.

from negligence which he had no reason to anticipate. There is good reason for holding him liable for injury caused by an act certain to be attended with injurious consequences if safeguards are not provided, no matter thru whose fault the omission to take the necessary measures for such prevention may arise. Hence, if an owner upon whose lands works are to be constructed, from the construction of which injury to adjoining premises must be expected to result, omits to take the necessary measures to prevent such mischief, he may be held liable.<sup>1</sup>

Nor can the employer expect to escape liability by pleading that work has been intrusted to an independent contractor, if the thing contracted to be done is unlawful, or creates a public nuisance, or by statute must be done efficiently and it is done inefficiently.<sup>2</sup>

4. *Fellow-servant and vice-principal.*—Who is a fellow-servant? In the English law provinces it will be of importance to know. A fellow-servant is one who is engaged with others for the same master in operative work. Their duties may not be similar, but they are fellow-servants if they are engaged in the same general business of their common employer. One may be of a higher grade than another, and these may not be engaged in the same particular work. In that they are performing operative acts for the general furthering of the business, they are fellow-servants.

<sup>1</sup> Cockshutt Plow Co., Ltd., vs. MacDonald, 8 D. L. R. 112.

<sup>2</sup> Berg vs. Parsons, 156 N. Y. 109.

In the English law provinces, then, when an employe is injured by the act or fault of a fellow-employe, the master is not liable. In the Province of Quebec, this fellow-servant rule is not followed. The master is responsible, tho the accident be due to the neglect or carelessness of the fellow-employe, whether he is a foreman or an ordinary workman.

A vice-principal, on the other hand, is one whom the master charges, in his stead, to provide warning of extraordinary danger, safe tools, for the employment of competent workmen, for the repair of machinery and maintenance of guards on dangerous machines. If the person so charged is careless in the performance of these duties and a workman is injured, it is as tho the master himself were negligent; and as a result he is liable in damages. The vice-principal is not a fellow-servant. The master's duties in these matters are said to be non-assignable; he does not rid himself of responsibility by charging another with the performance of his own duties.

5. *Master liable for servant's acts.*—The general rule is that the master is responsible for the negligent acts of his servant done in the course and within the scope of his employment. The servant will also be liable. The master would not be responsible for the acts of his servant done contrary to his positive instructions. He will be responsible where in the performance of his duties the servant is injudicious and causes damage, or is drunk and causes damage.

Thus if a servant, in the discharge of his duties, is

driving a horse which runs away and dashes thru a shop window, the master is liable. It would not be a sufficient plea that the servant was exercising reasonable care. A street-car conductor in the course of an argument with a passenger strikes and injures a passenger. The company is liable, because carriers must protect passengers from assaults or injuries by employes as well as by other passengers.

A man was driving a wagon just in front of a street car. He turned out for it at a street intersection, where many people were standing in the roadway waiting to board the car. He shouted for them to get out of the way, and drove thru the crowd in such a reckless manner as to strike a person who was attempting to board the car which was then opposite the wagon. The person struck was thrown down and the car ran over and crushed his foot. It was held that the master was clearly liable.<sup>1</sup>

6. *Servant's personal liability.*—A servant may render himself personally liable in certain cases. As we have just seen, he is liable with his master where he negligently causes injury to third persons or to property. He will be liable where, while acting as his master's agent, he does not, in dealing with third persons, disclose the fact of his agency. If he contracts in his own name for his master, he should describe himself as "agent for," or "per," "pro," and so on. If he wilfully causes damage, whether acting within the scope of his employment or not, he is liable

<sup>1</sup> Baillargeon vs. St. George, 4 D. L. R. 894.

as a principal. So also if, jointly with his master, he commits any fraud or crime.

7. *Workmen's compensation acts.*—We have indicated that at common law, in all the provinces, a workman who is injured in the course of his employment, has an action in damages against his employer. In several provinces, the common law rules have been altered by workmen's compensation acts. Under these acts, speaking generally, the employer is liable to compensate the workman for injuries which result:

(a) From defects in "ways, works, machinery, plant, buildings or premises" connected with the business.

(b) From negligence of those who have the superintendence of the work.

(c) From negligence of those to whose orders the workman was bound to conform and did in fact conform.

(d) By reason of an act or omission by an employe in compliance with rules or by-laws of the employer.

(e) By reason of the negligence of any person in the employer's service and in charge of any points or signals, machine, train or car.

If the accident is caused by the workman's wilful misconduct or negligence, he is not allowed compensation. The accident may have been caused by a fellow-employe. The injured workman may proceed against him or against the employer, but not against both.

The Quebec Workmen's Compensation Act makes

the employer liable (except in agricultural industries) for all accidents occurring to the workman by reason of or in the course of his employment, unless the accident was caused intentionally by the workman. If the workman or the employer is guilty of inexcusable fault, the courts may diminish or increase the compensation accordingly. Thus it has been held in a Quebec case that the fact that a workman, despite warnings, persists in remaining in a place of danger and is killed, is inexcusable fault on his part for which the damages should be diminished. It does not follow, however, that the accident was intentionally induced by him so as to deprive his representatives of the right of indemnity. The Quebec Act does not require, as do certain of the other acts, that notice of the accident or death be given within a stated period, but action must be brought within a year from the accident.

In Alberta and New Brunswick the court, in its discretion, fixes the compensation. In New Brunswick the payments are limited to a period of ten years. In the other provinces (except Quebec) the estimated earnings for the three years preceding the injury are the basis of computation, or the sum of one thousand five hundred dollars, whichever is the larger amount.

In Quebec, the workman is entitled to a rent equal to fifty per cent of his yearly wages, if he is absolutely and permanently incapacitated; in case of permanent partial incapacity, to a rent equal to half the amount by which his wages have been diminished. For tem-

porary incapacity, he is entitled to one-half his daily wage, beginning on the eighth day after the accident and while his incapacity lasts. If his yearly wage exceeds one thousand dollars, he has no claim under the act; but has his recourse at common law. If his wage is between six hundred dollars and one thousand dollars, then on any amount over six hundred dollars he receives only one-fourth of the compensation previously mentioned.

8. *Alien Labor Act.*—The Alien Labor Act is a veiled measure of retaliation against the United States, in that the Act applies only to immigration from countries which have enacted similar legislation applicable to Canadians who go to such countries. The Act provides:

That it shall be unlawful for any person, company, partnership or corporation in any manner to prepay the transportation, or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada under contract or agreement, parol or special, express or implied, made previous to the importation or immigration of such alien, to perform labor or service of any kind in Canada.

To contravene this provision is to commit a penal offense, the fine imposed being not less than fifty dollars, nor more than one thousand dollars. Imprisonment for a term not exceeding six months, and the payment of a fine of not more than fifty dollars for each alien landed, may be ordered in the case of the master of any vessel who knowingly violates the Act.

The Act does not apply in certain stated cases.

Foreigners living in Canada temporarily may contract with foreigners to act for them here as private secretaries, servants or domestics. A new industry is to be favored and to be guarded against loss for lack of skilled workmen. Hence a company engaged in a new industry not at present established in Canada may bring in skilled labor if it cannot be obtained here. There may be workmen of the class desired in Canada, but they may not be obtainable because they are already engaged. The Dominion Carriage Company erected a shop in which to build steel box-cars. It needed a number of riveters, and altho there were riveters working in Canada, it could not secure their services. It brought in several from the United States. Its action was upheld by the Court of Appeal of Quebec. The act does not bar professional actors, artists, lecturers, singers or persons employed strictly as personal or domestic servants. It does not prevent any person assisting some member or members of his family, or some relative or friend to come here to take a position if the newcomer's intention is to become a citizen of Canada. The Act does not affect the powers of the government of Canada or of any province to encourage immigration by circulating advertising matter in a foreign country. This private persons may not do.

#### REVIEW

Explain the relationship of master and servant and distinguish from agency.

Discuss the contract of hire and service. When does presumption of contract arise?

What is an independent contractor and what are his liabilities?

Define fellow-servant; vice-principal. What are their respective duties?

Who is liable: (a) for negligence by servants; (b) when a servant does not disclose the fact that he is his master's agent; (c) for a servant's wilful torts?

From what cause of injury to workmen is an employer liable?

What is the compensation rule in Quebec?

What is the Alien Labor Act? What classes are exempt from the Act?



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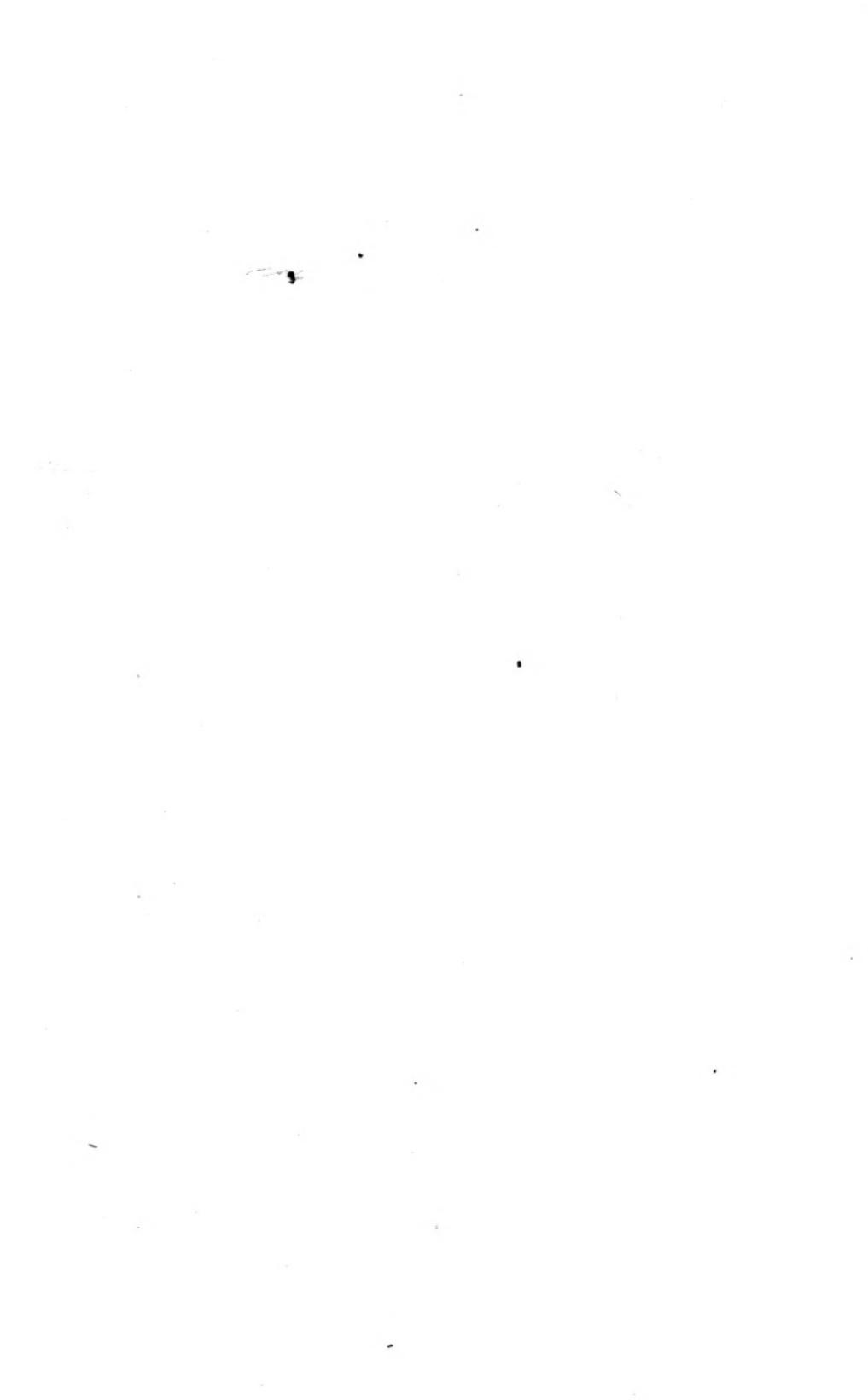
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